IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-535

KENIL K. GOSS,
Plaintiff-Appellant-Petitioner Pro Se

v.

REVLON, INC. and its wholly owned subsidiary,
USV PHARMACEUTICAL CORPORATION,
Defendants-Appellees-Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

K. K. GOSS
THE GENTRY, APARTMENT 618
21 FAIRVIEW AVENUE
TUCKAHOE, WESTCHESTER, N. Y. 10707

TELEPHONE (914) 793-4661

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. .....

KENIL K. GOSS, Plaintiff-Appellant-
Petitioner Pro Se

v.

REVLON, INC. and its wholly owned subsidiary, USV PHARMACEUTICAL CORPORATION,
Defendants-Appellees-Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

K. K. GOSS
THE GENTRY, APARTMENT 618
21 FAIRVIEW AVENUE
TUCKAHOE, WESTCHESTER, N. Y. 10707

TELEPHONE (914) 793-4661

SUBJECT INDEX

PARA-GRAPH	HEADING OR SUB-HEADING	PAGE
1.	INTRODUCTION	1
2.	OPINIONS BELOW	2
3.	JURISDICTION	3
4.	QUESTIONS PRESENTED FOR REVIEW	5
5.	FEDERAL CONSTITUTION, ACTS, RULES, REGULATIONS; NEW YORK STATE LAWS; NON-STATUTORY LAWS	11
	STATEMENT OF THE CASE	
6.	The Petitioner's Background	12
7.	R's Discrimination Against Others	12
8.	R's Discrimination Against G	12
9.	G's Abrupt Dismissal Without Cause	13
10.	R Agreed To G As Extended Employee	13
11.	R Requested Time To Settle Amicably	14
12.	G Applied For A Consulting Position But R Never Replied	14
13.	G's Extenuating Circumstances	15
14.	R's Continuing Tort Against G	15
15.	R's Continuing Breach Of Contract	17
	Proceedings Before EEOC And NYSDHR	
16.	Proceedings Before The EEOC	18
17.	Proceedings Before The NYSDHR	20
	Proceedings Before The SDNY	
18.	The Title VII Claim	20
19.	The ADEA Claim	21

SUBJECT INDEX

PARA-GRAPH	HEADING OR SUB-HEADING	PAGE
20.	1981, 1983 & 13th Amendment Claims	24
21.	G's Rewritten Complaint	26
22.	R Never Submitted Brief In Contempt	28
23.	R's Palpable Dilatory Motion Practice	29
24.	J Imposed Arbitrary And Capricious Fine Upon G	30
25.	J Denied G's Class Action Outright	33
26.	J Refused To Remand To The EEOC	35
27.	J Ignored G's Extenuating Circumstances	35
28.	R Procured Summary Judgment By Perjury And Subornation Of Perjury	36
29.	J Dismissed The Suit While R's Discovery Motion Was Still Going On	37
30.	J Denied G Outright To Reargue Or A New Trial	38
31.	G's Affidavits Under 28 USC §144	39
	Renewal Of Proceedings Before EEOC	
32.	G's Motion To Reopen EEOC Decision	40
	Proceedings Before Second Circuit	
33.	The First Appeal	40
34.	The First Petition For Rehearing	41
35.	The Second Appeal	42
36.	The Second Petition For Rehearing	42
37.	Summary	42

SUBJECT INDEX

PARA-GRAPH	HEADING OR SUB-HEADING	PAGE
	REASONS FOR GRANTING THE WRIT	
38.	"Special And Important Reasons"	43
39.	Rule 19.1(b) Of The RSC	45
	The Title VII Claim	
40.	"Jurisdictional Prerequisites"	46
41.	The Gist Of G's Arguments	46
42.	Even Timely Filing Brings No Relief	47
43.	Congressional Intent	48
44.	".. the still-open question .."	49
45.	Doctrine Of Equitable Estoppel	50
46.	Tolling Of Statutory Periods:	51
(A)	Extended Employee Status	51
(B)	"Undiscoverable Acts"	53
(C)	Hiring Of Replacement	53
(D)	Allegation Of Class Discrimination	55
(E)	Continuing Discrimination Charge	56
(F)	R Requested Time To Settle Amicably	57
(G)	State Charge Timely Filed	57
(H)	G's Extenuating Circumstances	60
(I)	R's Continuing Tort Against G	61
(J)	R's Continuing Breach Of Contract	61
47.	The Statutory Filing Period	62
48.	G's Employment Termination Date	62

SUBJECT INDEX

PARA-GRAPH	HEADING OR SUB-HEADING	PAGE
	Sub Silentio Denial Nunc Pro Tunc	
49.	Foman v. Davis, 371 U.S. 178 (1962)	63
50.	"In the absence of any apparent or declared reason"	64
51.	"outright refusal to grant the leave without any justifying reason appearing for the denial"	64
52.	The Judicial Ethics Of "sub silentio denial nunc pro tunc"	65
53.	5th Amendment: "due process of law"	65
54.	J's Grave Misconduct From The Bench	66
55.	Rules 1, 18(a) And 42(a) Of FRCP	67
56.	J Flouted Title VII's Mandate For A Speedy Trial	68
57.	Rules 8(e) And 15(a) Of The FRCP	69
58.	Rule 8(f) Of The FRCP	69
59.	The Doctrine Of "Notice Pleading"	70
60.	G's Alleged "extended and undue delay"	71
61.	Consequence Of Failure To Exercise Discretion	72
62.	"sub silentio" Is A Two-Edged Sword	72
63.	The Quality Of "sub silentio"	73
64.	No Trial Ever Took Place	74
65.	R Unprejudiced By G's Alleged "extended and undue delay"	74
66.	Rule 15(c) Of The FRCP	76
67.	J Induced A Cart Before The Horse Or A Dog In The Manger Stalemate	77

SUBJECT INDEX

PARA-GRAPH	HEADING OR SUB-HEADING	PAGE
68.	G's Rewritten Complaint	78
69.	EEOC's Deficient Complaint Form	79
70.	Rule 61 Of The FRCP	83
	'Law Of The Case'	
71.	Bryan v. Austin, 354 US 933 (1957)	83
	Arbitrary Capricious Excessive Fine	
72.	Miller v. International Paper Co.	87
73.	5th Amendment: "due process of law"	89
74.	8th Amendment: "excessive fines"	89
	J Refused To Remand The Case To EEOC	
75.	A "de novo" Trial	91
76.	The CA2's Weise Ruling	92
77.	J's Abuse Of Discretion In Refusing To Remand G's Case To The EEOC	92
78.	EEOC's Hasty, Illegal And Premature Determination	94
	The ADEA Claim	
79.	Timely Notice Of Intent To Sue	97
80.	Shell Oil Co. v. Dartt, 76-678	97
	J's Outright Denial Of Class Action	
81.	J's Abuse Of Judicial Process	98

SUBJECT INDEX

PARA-GRAPH	HEADING OR SUB-HEADING	PAGE
	Summary Dismissal	
82.	J's Illegal Or Wrongful Dismissal	99
83.	J Dismissed Suit During Discovery	101
84.	R's Post-Discovery Disclosure	101
85.	The 'slightest doubt' Rule	102
86.	Jaroslawicz v. Seedman, CA2	104
	Denial Of Reargument Or New Trial	
87.	J's Abuse Of Judicial Process	105
	13th Amendment And §1983 Claims	
88.	The 13th Amendment Claim	106
89.	§1983 Claim	106
	Affidavits Of Bias Or Prejudice	
90.	J's Prejudicial Remarks From The Bench	107
91.	J's Profound Pro-employer Bias	109
92.	J's Procrastination In Putting G's Case To Trial	110
93.	"a barrage of post-trial motions"	111
94.	G's Affidavits Under 28 USC §144	112
	J Denied Before "Mandate" Issued	
95.	Rule 41(a) And (b) Of The FRAP	113

SUBJECT INDEX

PARA-GRAPH	HEADING OR SUB-HEADING	PAGE
	The Question Of Equity	
96.	G Did Not 'Sleep On His Rights'	115
97.	Civil Rights Claims Are Viewed With Liberal Eyes	115
98.	CA2's Double Standard Of Justice	116
99.	J's 'Double Standard Of Justice'	119
100.	CONCLUSION	120
	APPENDICES	
	APPENDIX A: CA2's 1st Judgment	A- 2
	APPENDIX B: CA2's 2nd Judgment	A- 6
	APPENDIX C: CA2's 1st Rehearing Denial	A- 8
	APPENDIX D: CA2's 2nd Rehearing Denial	A- 9
	APPENDIX E: SDNY's Outright Summary Judgment In R's Favor	A-10
	APPENDIX F: SDNY's Outright Denial Of G's Opposition Motion	A-11
	APPENDIX G: SDNY's Outright Denial Of Reargument Or New Trial Based On New USCA Decisions And New Facts	A-13
	APPENDIX H: SDNY's Outright Denial "sub silentio" after 827 days, but "nunc pro tunc" to 1,071 days earlier	A-15
	APPENDIX I: EEOC's Determination While State Charge Was Pending	A-16

TABLE OF CASES

PAGE

Albemarle Paper Co. v. Moody,
422 U.S. 407 (1975) 34, 99

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) ..... A- 4

Battle v. National Bank of Cleveland,
364 F.Supp. 416 (1973) 73, 106

Bon Air Hotel, Inc. v. Time, Inc.,
376 F.2d 118 (CA5, 1967) 88

Braddix v. Charles Todd, Inc.,
74-110-E, ED, Ill, 11 EPD 10611, '75 . 74

Brisbane v. Port Authority NY & NJ,
76 Civ. 1548 (RO) SDNY, 12 EPD 11059 . 119

Bryan v. Austin, 354 U.S. 933 (1957) . 83

Burnett v. NY Central Railroad Co.,
380 U.S. 424 (1965) 10, 115

Choate v. Caterpillar Tractor Co.,
402 F.2d 357 (CA7, 1968) 81

Christensson v. Hogdal,
199 F.2d 402 (CADC, 1952) 70

Cissna v. McQuaid, 74-482 USSCt. 90, 103

Conley v. Gibson,
355 U.S. 41 (1957) 42, 70, 101

Cooper v. Pate, 378 U.S. 546 (1964) . 101

Crouch v. United Press Interntl.,
74 Civ. 296 SDNY, 10 EPD 10,393 .. 60-61

Culpepper v. Reynolds Metals Co.,
421 F.2d 888 (CA5, 1970) 57, 115

Downey v. Palmer,
114 F.2d 116 (CA2, 1940) 85, 86

Egelston v. Ste. Univ. at Geneseo, .. 5, 50,
76-7047 CA2, 12 EPD 11004 ... 51, 53-56,
..... 100-101, 112, 116-120

TABLE OF CASES

PAGE

Foman v. Davis, 371 U.S. 178 (1962) .. 42, ... 63-64, 67, 70-71, 105

B. F. Goodrich Tire Co. v. Lyster, 328 F.2d 411 (CA5, 1964) 87

Goss v. Revlon, Inc., .. 2, 5-6, 41-42, 50, 548 F.2d 405 (CA2 1976) ... 52-60, 62, 71, ... 73-74, 77-79, 83, 86, 90, 95-97, 99, ... 102, 104-106, 111-113, 117-120, ... A-2 to A-5, A-7

Haines v. Kerner, 404 U.S. 519 (1971) 81

Hall v. Werthan Bag Corp., 251 F.Supp. 184 (1966) 48

Hammond Packing Co. v. Arkansas, 212 U.S. 322 ( ) 65, 90

Harkness v. Sweeny, 75-1533 CA5 July 1, 1977; 14 EPD 7669 77

Head v. Timken Roller Bearing Co., 486 F.2d 870 (CA6, 1973) A-5

Heyman v. Commerce & Industry Ins. Co., 524 F.2d 1317 (CA2, 1975) 100

Hoven v. Elliott, 167 U.S. 409 .. 65, 90

Jaroslawicz v. Seedman, CA2, The ... 10, NY Times, Sat., Dec. 20, 1975 ... 104-105

Jenkins v. United Gas Corp., 400 F.2d 28 (CA5, 1968) 91

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) 77, 96, A-4

Thomas Kaiser v. Cahn, 510 F.2d 282 (CA2, 1974) A-4

Lloyd v. United Liquors Corp., 203 F.2d 789 (CA6, 1953) 75

TABLE OF CASES

PAGE

Lone Star Motor Import, Inc. v. Citroen Cars Corp., 288 F.2d 69 (CA5, 1961) 72

Longbottom v. Swaby, 397 F.2d 45 (CA5, 1968) 77

Love v. Pullman Co., ... 10, 42, 57-58, 75, 404 U.S. 522 (1972) 80, 82, 115, 117, 119

Macklin v. Spector Freight Systems, 478 F.2d 979 (CADC, 1973) A-4

Miller v. International Paper Co., .. 34, 408 F.2d 283 (CA5, 1969) .. 87-88, 89, 115

Minnesota Mining and Manufacturing Co. v. New Jersey Wood Co., 381 U.S. 311 (1964) 115

Moore v. Bank of New Orleans, 75-2144, ED, La.; 11 EPD 10,946 ... 61

Moses v. Falstaff Brewing Corp., ... 10, 525 F.2d 92 (CA8, 1975) ..... 35, ... 39-40, 51-52, 105, 115

National Screen Service Corp. v. Poster Exchange, Inc., 305 F.2d 647 (CA5, 1962) 102

Neeff v. Emery Transportation Co., 284 F.2d 432 (CA2, 1960) 85

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 49

New York Telephone Co. v. Communication Workers of America, SDNY, NY Times, Wed., May 25, 1977 109

Noble v. University of Rochester, .. 5, 76-7133 CA2; 12 EPD 11,005 ..... 51, ... 53-56, 112, 116, 119-120

Northwest Orient Airlines v. Gorter, 254 F.2d 652 (CA9, 1958) 72

TABLE OF CASES

	PAGE
Reeb v. Economic Opportunity .... Atlanta, Inc., ... 516 F.2d 924 (CA5, 1975)	5, 50, 53, 108, 115
Sánchez v. Standard Brands, Inc., .. 431 F.2d 455 (CA5, 1970)	34, 35, 119
Scheuer v. Rhodes, 416 U.S. 232 (1974)	101
Shell Oil Co. v. Dartt, 76-678 USSCt ... (Ap. fr. CA10; 12 EPD 11,119)	97, 98, 102
Smith v. United Press Intrntl., ... 74 Civ. 555 JMC; 8 EPD 9512	81, 82, 116
Smith v. Universal Services, Inc., 454 F.2d 154 (CA5, 1972)	91
Societe Internationale v. Rogers, 357 U.S. 197 ( )	65, 90
South Suburban Safeway Lines, Inc. v. Carcards, Inc., 256 F.2d 934 (CA2, 1958)	72, 85
Suttle v. Exxon Co., U.S.A., MD Fla., 75-674 Civ. T-K; 13 EPD 11,528	61, 62
Tarvesian v. Carr Division of TRW, Inc., 407 F.Supp. 336 (1975)	61
Topping v. Fry, 147 F.2d 715 (CA7,'45)	85-86
Troxel Manufacturing Co. v. Schwinn Bicycle Co., 489 F.2d 968 (CA6,'73), cert. denied, 416 U.S. 939 (1974)	A-5
Weise v. Syracuse University, ... 522 F.2d 397 (CA2, 1975) ..	7, 50, 92, 116-117, A-3
Woodford v. Kinney Shoe Corp., 369 F.Supp. 911 (1973)	102
Voutsis v. Union Carbide Corp., . 452 F.2d 887 (CA2,'71)	49, 58, 60, 80-82, 91, 116-117
Zenith Radio Corp. v. Hazeltine Research Inc., 401 U.S. 321, rehearing denied, 401 U.S. 1015 (1971)	42, A-7

TABLE OF LAWS

PAGE

Federal Constitution

Declaration of Independence, second paragraph 11, 86

Constitution of the United States of America, Article III, Section 2, Clause 1 .. 7, ... 11, ... 93

Amendment V 5, 11, 65, 89-90

Amendment VIII 7, 11, 89-90

Amendment XIII .... 4, 5, 8, 11, 24, 43, ... 84, 105-106, A-3

Federal Acts

18 U.S.C. §1621 ..... 9, 11, 36-37, ... 100, 102, 104, 111

18 U.S.C. §1622 .. 9, 11, 36-37, 100, 111

28 U.S.C. §144 ..... 10-11, 39, 44, 66, ... 88, 93, 107-113

28 U.S.C. §452 ..... 11, 49

28 U.S.C. §1254(1) 4, 11

28 U.S.C. §1343(4) .. 4, 8, 11, 24, 84, 105

29 U.S.C. §621 ("ADEA" Sec.1) A-3

29 U.S.C. §626 ("ADEA" Sec. 7(c)) .. 4, 8, ... 11, 21-24, 43, ... 97, 105-106, 118

("ADEA" Sec. 7(d)) .. 11, ... 22-23, 39, 51, .. 97-98, 118-119

29 U.S.C. §633 ("ADEA" Sec.14(a)) . 11, 23

("ADEA" Sec. 14(b)) .. 11, ... 22, 98

42 U.S.C. §1782 106

TABLE OF LAWS

PAGE

42 U.S.C. §1981 .... 4, 6-7, 11, 24, 43, ... 76, 80, 84, 96, 105, .. 106, A-2 to A-5, A-7

42 U.S.C. §1983 ..... 4, 11, 24, 43, 84, ... 105-106, A-3

42 U.S.C. §2000e-5 ("Title VII" Sec.706):

Original Section 706(e) 11, 47

The Equal Employment Opportunity Act of 1972 ..... 4, 11, 46-47, 68

Amended Section 706 ("Title VII"):

... 3-8, 10-11, 14-15, 19-21, ... 39-40, 43, 46-52, 55-56, ... 58, 61, 68, 79-82, 88-89, ... 94-95, 107-109, 117-119, ... A-2 to A-5, A-10, A-16

Federal Rules

Rules of the Supreme Court ("RSC"):

Rule 19(1) ... 1, 10-11, 41-42, 44-48, ... 50-51, 53-54, 57-61, ... 63-65, 76, 78, 83, 87, ... 90, 94, 96, 98-99, ... 104-106, 113-114, 120

Federal Rules of Appellate Procedure ("FRAP"):

Rule 4(a) 11, 42, 105

Rule 40(a) ..... 1, 3, 11, 41-42, 45, ... 51-52, 54, 59, 64, 84, ... A-8, A-9

Rule 41(a) ..... 10, 11, 41, 45, ... 64, 113-114

Rule 41(b) ..... 11, 64, ... 113-114

TABLE OF LAWS

PAGE

Federal Rules of Civil Procedure ("FRCP"):

Rule 1 . . . . . 11, 67-68
Rule 8(e) 11, 69
Rule 8(f) 11, 69-70
Rule 15(a) . . . . 2, 4-6, 11, 24, 27, 63-64, 66, 69, 71-75, 78-79, 84-86, A-2 to A-5, A-15
Rule 15(c) 11, 76-77, A-4
Rule 18(a) 11, 67
Rule 23(a) 9, 11, 29-30, 33-34, 55, 79, 98-99, 106, A-3
Rule 42(a) 11, 67
Rule 56 . . 2-3, 9, 11, 26-29, 32-33, 36-39, 52, 66, 72, 75-76, 85, 90, 93, 95, 99-104, 112, 116-117, A-2, A-4, A-5, A-10, A-12 to A-15
Rule 59 . . . . . 3, 10-11, 38-39, 52, 105, 112, A-13
Rule 61 . . . . . 11, 83

"Local Rules" of the SDNY:

Rule 9(m) . . 3, 11, 38-39, 52, 105, A-14

EEOC Procedure

Section 1601.8 . . . 11, 19, 56, 94
Section 1601.11(b) .. 11, 22, 34, 55-56, 94
Section 1601.19 . . . . 7, 11, 19-20, 58, 60, 80, 92-94, 120
Section 1601.25 . . . . . 11, 19, 94

TABLE OF LAWS

PAGE

New York State Laws

Civil Practice Law and Rules:

Section 214(2) . . . 8, 11, 24-25, 66, 68, 71, 74-76, A-4

Human Rights Law ("NYSHRL"):

Section 297.1 . . 4, 8, 11, 14-15, 20

Section 297.5 . . 8, 11, 15, 20, 22, 62

Section 297.9 . . 11, 20, 23, 59-60, 95

Non-Statutory Laws

'Law of the Case' 6, 11, 83, 86

Law of Contempt of Court . . . 9, 11, 28

Law of Contract:

Law of Agency 11, 21-22

Breach of Contract . . 8, 11, 17-18, 61

Law of Evidence 11, 98-99

Law of Tort:

"Res Ipsa Loquiter" 11, 55

"Volenti Non Fit Injuria" . . . 11, 57

False and Malicious Employment . . 8, 11, References 15-18, 61

EEOC DECISIONS

Case No. LA 68-4-538E, June 16, 1969; §6125, pp. 4222-4224, CCH 1973 . . 53

Case No. 72-1702, April 26, 1972; §6361, pp. 4649-4652, CCH 1973 . . 55

Case No. 72-1884, May 31, 1972; §6378, pp. 4705-4711, CCH 1973 56

REFERENCES

PAGE

Textbooks

Sir William R. Anson's "Principles of the English Law of Contract" (a well known student textbook, abridged from his famous reference book), 20th Edition (1952) edited by Professor J. L. Brierly of Oxford University, citing an obitur dictum of Lord Blackburn in the House of Lords decision in Brogden v. Metropolitan Railway Co., 2 Appeal Cases 666, 692 (1877) (a leading British case in securities fraud), quoting the famous aphorism of the Chief Justice Brian of England in 1477 (during the reign of Edward IV from 1461 to 1483) at pp. 32-33. 65

Moore's "Federal Practice", 1964 Edition, Chapter 15 at following pages:

896 72
901 75
902 76
945 71
957 84-85
958 85
969 84
972 70

Webster's Dictionary 72, 89

CCH's Law Books:

"EEOC Decisions" (1973) 53, 55, 56

"Employment Practices Guide", Vol.1... 47

"EPD", Vols.1-2,4,6-14 ... 50-51, 57-58 ..... 61-62,73,77,80-82,87-88,91-92,96 ... 98,100-102,106,108,112,115-117,119

REFERENCES

PAGE

Newspapers

Congressional Record, Volume 110, June 17, 1964 at following pages:
13694 (Senator Humphrey's speech) .. 49
14191 (Senator Javits' speech) 48

The New York Times:
Saturday , December 20, 1975 104
Sunday , January 25, 1976...110-111
Tuesday , June 8, 1976 54
Friday , September 10, 1976 100
Tuesday , October 5, 1976 102
Wednesday, October 13, 1976 104
Wednesday, May 18, 1977 43
Monday , May 23, 1977 43
Wednesday, May 25, 1977 109
Saturday , May 28, 1977 44

GOVERNMENT AGENCIES CITED

Federal

EEOC...3-5, 7-8, 14, 18-22, 27, 29, 34-35, ...40, 46-48, 50-51, 53, 55-56, 58-60, ...62, 79-82, 91-95, 97, 108, 118-120, ... A-3, A-4, A-16
Department of Justice 93
Secretary of Labor 51, 97
OFCC 118
WHD 21, 22-23, 97, 118-119
SEC 101

GOVERNMENT AGENCIES CITED

PAGE

New York State

NYSDHR 4, 8, 14, 18-20, 22-23,
. . . . . 58-60, 62, 94-96, 98, A-4

JURISTS CITED

Chief Justices

Brian of England in 1477 65
Burger of U.S.SCt in 1977 . . 43-44, 67

Associate Justices

Blackmun 96
Late Tom Clark 49
Goldberg 63
Stewart 57

Circuit Judges

CA2: Kaufman, Chief...40-41, 49-50, 73-74,
Judge 104, A-2, A-8
Mansfield . . . . . A-2, A-6 to A-9
Meskill A-2, A-8
Feinberg 104
Smith, J. Joseph 104, A-9
Timbers 49

CA5: Bell (now Attorney General) . . 87

District Judges

EDNY: Bruchhausen, late Chief 104
NDNY: Burke 117
SDNY: Canella 81
Owen 2, 20, A-2, A-4, A-5,
. . . . . A-7, A-10, A-12 to A-15
Palmieri A-6, A-7, A-9
Smith, Russell E. A-6, A-7
Tenney 20
? : Sparks 85

JURISTS CITED

PAGE

U. S. Magistrate

SDNY:Raby 30-31, 66, 110

LAW PROFESSOR CITED

Victor Kramer, Georgetown Law Center, Washington, D. C. 110-111

ABBREVIATIONS USED

ADEA	= Age Discrimination in Employment Act of 1967.
CFO	= Chief Financial Officer.
CCH	= Commerce Clearing House, Inc.
CA2	= United States Court of Appeals for the Second Circuit.
EPD	= Employment Practices Decisions published by CCH.
EEOC	= Equal Employment Opportunity Commission.
FRAP	= Federal Rules of Appellate Procedure.
FRCP	= Federal Rules of Civil Procedure.
G	= Kenil K. Goss, Petitioner.
J	= The Honorable Judge Richard Owen of the SDNY.
NYSDHR	= New York State Division of Human Rights.
NYSHRL	= New York State Human Rights Law.
OFCC	= Office of Federal Contract Compliance.

ABBREVIATIONS USED

R	= Revlon, Inc. and its wholly owned subsidiary, USV Pharmaceutical Corporation, Respondents.
RSC	= Rules of the Supreme Court.
SEC	= Securities and Exchange Commission.
SDNY	= United States District Court for the Southern District of New York.
Title VII	= Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (also amended Section 706, or 42 U.S.C. §2000e-5).
UPI	= United Press International, Inc.
USDC	= United States District Court.
USV	= USV Pharmaceutical Corporation, the second respondent.
WHD	= Wage and Hour Division, Employment Standards Administration, U. S. Department of Labor.
1981	= 42 U.S.C. §1981.
1983	= 42 U.S.C. §1983.

GENERAL NOTES

(1) In many places various cases and laws have not been specifically mentioned (in order to avoid needless distractions), but would be obvious to the learned Justices, and hence have been so indexed for easy references.

(2) "J" appears in almost every page, but not so indexed to avoid repetitions.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

==========

No.

==========

==========

KENIL K. GOSS, Plaintiff-Appellant-
Petitioner Pro Se

v.

REVLON, INC. and its wholly owned subsidiary, USV PHARMACEUTICAL CORPORATION,
Defendants-Appellees-Respondents

==========

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT - NEW YORK

INTRODUCTION

1. The petitioner, Kenil K. Goss ("G") prays that a Writ of Certiorari be issued to review the two judgments of the United States Court of Appeals for the Second Circuit ("CA2") rendered on October 29, 1976 and on April 29, 1977, together with its two denials of rehearings thereof

rendered on Dec. 20, 1976 and on June 7, 1977 respectively. The first judgment:

"Affirmed in part; remanded in part." (p.A-2), the summary dismissal of the suit without any trial or hearing on its merits by the Honorable Judge Richard Owen ("J") of the United States District Court for the Southern District of New York ("SDNY") on November 7, 1975. The second judgment affirmed J's "sub silentio denial nunc pro tunc" on November 16, 1976, which was 827 days after G's timely motion for a leave to amend G's complaint, in order to assert additional statutes in support of G's same claim of unlawful employment discrimination practices by the Respondents ("R"), Revlon, Inc. and its wholly owned subsidiary, USV Pharmaceutical Corporation ("USV") as in the original complaint. Both the judgments are based on incorrect facts self-assumed by the CA2.

OPINIONS BELOW

2.1. The CA2's first judgment entered on October 29, 1976, reported in 548 F.2d 405 (CA2, 1976) is in Appendix A.

2. The CA2's unreported second judgment

entered on April 29, 1977 is in Appendix B.

3. The CA2's two unreported denials of rehearings entered on December 20, 1976 and on June 7, 1977 are in Appendix C and in Appendix D respectively.

4. The SDNY's unreported orders were:

Date Of Entry	Nature of Disposition	Set Forth In
Nov. 7, 1975	Note (a)	Appendix E
Nov. 11, 1975	Note (b)	Appendix F
Dec. 31, 1975	Note (c)	Appendix G
Nov. 16, 1976	Note (d)	Appendix H

Notes:

(a) Suit dismissed without any trial;
(b) G's motion denied outright;
(c) New trial or to reargue denied; and
(d) Outright denial upon remand, sub silentio nunc pro tunc.

5. The determination of the Equal Employment Opportunity Commission ("EEOC") of October 17, 1973 is in Appendix I.

JURISDICTION

3.1. On March 20, 1973 G filed with the EEOC his charge of R's employment discrimination against G and others under Sec.706(b) of the Civil Rights Act of 1964, as amended by the

Equal Employment Opportunity Act of 1972 ("Title VII"). On the same day the EEOC mailed a copy of the charge to the New York State Division of Human Rights ("NYSDHR"), under Section 706(c) of the Title VII, for processing under Section 297.1 of the New York State Human Rights Law ("NYSHRL").

2. The suit was commenced in the SDNY on October 25, 1973 and refiled on December 12, 1973 (on the EEOC's standard forms), under Section: (i) 706(f)(1) of the Title VII; and (ii) 7(c) of the Age Discrimination in Employment Act of 1967 ("ADEA").

3. On August 8, 1974 G filed a timely motion: (i) asserting 42 U.S.C. §1981 ("1981") and §1983 ("1983"), and the 13th Amendment, read with 28 U.S.C. §1343(4), in support of the same facts as in the original complaint; and (ii) praying for a leave to submit a rewritten complaint, in order to meet R's "FIRST AFFIRMATIVE DEFENSE":

> "The complaint fails to state a cause of action against defendants upon which relief can be granted.".

4. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

4.A. Is the CA2 correct in holding that:

> "The failure to file timely charges with the EEOC was, of course, a jurisdictional bar to this proceeding as well." (p.A-3),

without any regard to the nature and the quality of such untimeliness? Or is it a mere statute of limitation and thus subject to equitable estoppel, as held by the CA2 itself in two other cases only 4 months earlier and by the CA5 in several recent cases?

B. Having regard to the 5th Amendment's paramount requirement of the "due process of law", is it Constitutional for any United States District Court ("USDC") to deny, "sub silentio nunc pro tunc" after 827 days, without any hearing on the merits of the case, or without even any justifying reason therefor, a non-lawyer pro se plaintiff's timely and repeated motions - praying for a leave to amend his complaint in order to cite additional statutes and the 13th Amendment in support of the same claim of the defendant's unlawful employment discrimination practices against him, as stated in the original complaint - inspite of a remand by its higher Court "for a determination"?

C. As a corollary to the preceding question, where a higher Court has already established a 'law of the case' that:

> "the district court improperly failed to rule on that motion." (p.A-2),

from the dictionary meaning of the above phrase "improperly failed", does it not naturally follow that there had indeed been "an abuse of discretion" by the same USDC, so as to render it as incumbent upon the higher Court: (i) to grant the leave itself automatically to amend the plaintiff-appellant's complaint, as prayed by him; or (ii) at least to reverse the USDC's denial "sub silentio nunc pro tunc" upon the second appeal?

D. Where a higher Court has already established a 'law of the case' that the:

> "appellant's failure to meet the jurisdictional requirements of Title VII does not preclude his cause of action under §1981."

(p.A-4), how can he assert it, where: (i) the same higher Court in its second judgment (p.A-7) has also held that:

> "we find no abuse of discretion in the district court's denial of leave to amend.";

and (ii) the same USDC, following its higher Court's 2nd ruling, could dismiss a de novo

suit in respect of his 1981 claim?

E. Having regard to the 8th Amendment's paramount prohibition against "excessive fines", is it Constitutional for any USDC to impose an arbitrary and capricious fine of $50 upon an unaffluent and a non-lawyer pro se plaintiff, who has been fighting for his just right under the Civil Rights Acts and who is not guilty of any dilatoriness, payable to a billion dollar corporation, when: (i) it did not even pray for it; and (ii) the clear language or the intent of the Acts is to assist the claimants financially?

F. Where a Title VII suit is based on the dismissal of the charge by the EEOC, is it not axiomatic for the USDC concerned to ascertain, as it is a de novo suit, whether or not the charge had been illegally or wrongfully dismissed and more so when the plaintiff so alleges? Hence is it an abuse of discretion by the USDC to refuse to remand the suit to the EEOC, under its inherent power to do so conferred by Clause 1, Section 2, Article III of the Constitution, and indeed as recommended by its higher Court recently?

G. In a civil rights suit, is it a just or proper judicial procedure for any USDC:

(a) to ignore the plaintiff's timely and repeated assertions of his claim under:
(i) the ADEA, in respect of which he had complied with all of the statutory requirements, and which the defendant did not even oppose until 666 days later?
(ii) the 13th Amendment, read with 28 U.S.C. §1343(4), which the defendant had never opposed?

(b) to ignore the plaintiff's timely and repeated pleadings of continuing discrimination due to the defendant's continuing tort and breach of contract that tolls the statute of limitation of that state?

(c) to ignore the Title VII's mandate for a speedy trial?

(d) to refuse to consider the plaintiff's extenuating circumstances in being late in filing of his charge with the EEOC by only 53 days?

(e) to refuse to recognize the fact that the plaintiff had filed a valid and timely charge with the state authority in respect of the same facts, as required by the Title VII?

(f) to allow palpable and persistent defense dilatoriness?

(g) to excuse many defense laches and contempt of court?

(h) to deny a class action where the defendant's own documents, signed by its top corporate officers, conclusively prove such class discrimination?

(i) to give summary judgment to the defendant, based on its untimely motion, supported by a perjury of its employee (who has had no "personal knowledge" in the subject matter) suborned by its attorney, but to refuse to consider, by its own admission, the plaintiff's timely opposition motion, supported by the defendant's own documents, including affidavits of its top corporate officers?

(j) to dismiss the suit behind the plaintiff's back on the very day (possibly at the same time) it orders him to deliver the defendant's own documents to the defendant, in response to its discovery motion, while "reserving decision" to allow the discovery to continue?

(k) to deny outright without any hearing the plaintiff's timely motion for a

new trial based on new facts and important and relevant recent decisions by the CA2 and the CA8?

(l) to ignore many judicial pronouncements (including by this Court) holding the Title VII suits "with liberal eyes", particularly where a plaintiff thereof did not "sleep on his rights" but actively pursued for an amicable settlement of some of his claims at the defendant's own request?

H. Is it ultra vires of any USDC judge to "proceed" any "further" on a case, after the plaintiff had filed "a timely and sufficient affidavit" under 28 U.S.C. §144 on ground of the judge's persistent "personal bias or prejudice"?

I. Is it ultra vires of any USDC judge to decide on a case after its remand by its higher Court, while: (i) the plaintiff-appellant's petition for rehearing was still pending there, and (ii) the "Mandate" had not been issued by that higher Court under Rule 41(a) of the Federal Rules of Appellate Procedure ("FRAP"), and thereby depriving him of an opportunity to file a timely petition for a writ of certiorari to this Court?

FEDERAL CONSTITUTION, ACTS, RULES, REGULATIONS; N. Y. STATE LAWS; NON-STATUTORY LAWS

5.1. Federal Constitution: Declaration of Independence; Article III, Section 2, Clause 1; Amendments V, VIII and XIII.

2. Federal Acts: 18 U.S.C. §§1621-1622; 28 U.S.C. §§144, 1254(1) & 1343(4); 29 U.S.C. §§626 & 633 (ADEA Secs. 7(c), 7(d), 14(a) & 14(b)); 42 U.S.C. §§1981, 1983 & 2000e-5 (Title VII Sec. 706, original, Equal Emplymnt.Oprtnty.Act of '72 & amended).

3. Federal Rules: Rule 19(1) of the RSC; Rules 4(a), 40(a), 41(a) & 41(b) of the FRAP; Rules 1, 8(e), 8(f), 15(a), 15(c), 18(a), 23(a), 42(a), 56, 59 and 61 of the FRCP; Rule 9(m) of the "Local Rules" of the SDNY.

4. EEOC Procedure: Sections 1601.8, 1601.11(b), 1601.19 and 1601.25.

5. New York State Laws: Section 214(2) of the Civil Practice Law and Rules; Sections 297.1, 297.5 & 297.9 of the NYSHRL.

6. Non-Statutory Laws: 'Law of the case'; Law of Contempt of Court; Law of Contract (Law of Agency; Breach of Contract); Law of Evidence; Law of Tort ("Res Ipsa Loquiter"; "Volenti Non Fit Injuria; False and Malicious Employment References).

STATEMENT OF THE CASE

6. The Petitioner's Background: G is not a lawyer and has had no benefit of any legal advice during the long fight over the last four years, including in preparing this petition. He is not a white man and the English language is not his mother tongue.

7. R's Discrimination Against Others: R has a long and notorious record of unlawful employment discrimination. R's own documents in G's possession show such discrimination since 1941, of which some signed by its top corporate officers admitting it as far back as 1957 are on the SDNY's file pertaining to this case.

8. R's Discrimination Against G: R employed G on fulltime and on active basis from April 14, 1967 to March 31, 1972. R discriminated against G with 42 different types of unlawful practices, which began from the very first day of his employment (such as, a considerably lower starting salary than it stipulated for white men to its employment agent). G tried his best to eradicate such practices against him amicably, while he was still actively employed, but his repeated

efforts in good faith were subsequently proved to be fruitless.

9. G's Abrupt Dismissal Without Cause: As a part of such practices, on March 7, 1972 at 5.15 p.m. (after R's office closing hour) R served G with a curt "you are fired" oral dismissal notice, without any prior hint or provocation, and whisked G out of its building by two armed and husky security guards in less than 5 minutes, not even allowing G to pick up all of his personal belongings. R then gave G no reason whatsoever for his sudden dismissal only a month after his so called promotion from "a staff accountant" to "a staff assistant".

10. R Agreed To G As Extended Employee: R, however, agreed that G would continue to be on its payroll as a fulltime and active employee upto and including March 31, 1972 but excused from reporting to work in order to enable him to devote fulltime in search of another employment. R also agreed to pay G his last salary for another 66 days (severance 28 + vacation 38). Thus, R agreed to his extended employee status upto and including June 5, 1972.

11. R Requested Time To Settle Amicably: At the time of his dismissal G told R of his intention of filing his charges of employment discrimination against R with the NYSDHR and the EEOC. Realizing its gravity, R immediately requested G for some time to settle some of the most glaring instances of discrimination against him. Subsequently, R's Personnel Director requested him for more time, as did its Chief Financial Officer ("CFO") still more subsequently on July 20, 1972, to settle the same amicably. The settlement took place at last on November 7, 1972.

12. G Applied For A Consulting Position But R Never Replied: G wrote a letter to R on March 23, 1972 offering his services as a consultant in his professional capacity as a C.P.A. R never replied it. But its CFO told G on July 20, 1972 (after ordering R's Personnel Director out of his office and closing its door) that G's letter was under consideration and expressed positive hope, and then gave a glowing account of R's foreign business expansion. The CFO then concluded the closed door meeting with G by assuring G that all of the outstanding issues would be settled

amicably and thus there would be no need for G to file his charges against R. Not being a lawyer, G in good faith believed in such seemingly genuine representation and decided to defer the filing of his charges against R until the outcome of the representation made known to G by R. The point here is that one has got to trust upon the solemn representation of the CFO of a billion dollar multi-national corporation. It, however, subsequently transpired that the representation was actually a conspiracy to defeat G's civil rights by dissuading G from filing his charges within the statutory periods.

13. G's Extenuating Circumstances: To make the matter worse, G suddenly became critically ill from March 17, 1972 and was confined to bed or house for the rest of 1972. Thereafter G was away for two months recuperating in a warmer climate in Mexico at the order of his physician.

14. R's Continuing Tort Against G: After returning from Mexico, while searching for another employment in February and March 1973, G discovered that R maliciously falsified its personnel records of him, on the basis of which R was giv-

ing out damaging references as to his former titles (or rather lack of them) to prospective employers and their employment agents. R's falsified records still show that R employed G only in a lowly and titleless position of "a staff accountant" for the entire period of his employment for full five years, whereas R's true records (comprising hundreds of pages, including some sworn by its top corporate officers) in G's possession show G's titles as (i) "The International Auditor" from April 14, 1967 to December 31, 1968; and (ii) "Assistant Controller - International" from January 1, 1969 to (at least) January 20, 1971. Based on R's true records, G prepared and circulated his résumé among employment advertisers. But due to R's maliciously false references to the employment advertisers, G was exposed to them as a 'liar'. The unfortunate result was that, inspite of a booming job market then prevailing for "Big 8" trained C.P.As. (as G is one), he had no luck whatsoever, notwithstanding to his exceptional qualifications and experience, and to his best efforts. All the prospective employers shied away and their employment agents gave up, since no

employer would hire or retain a C.P.A. with such a false employment records, as no other position calls for greater trustworthiness than that of a C.P.A. Immediately upon learning the malicious tort, G took it up with R, but R refused to rectify it.

15. R's Continuing Breach Of Contract: Before we can present the adversarial proceedings, another very important fact must be mentioned here. R decided to move its USV unit's headquarter (in which R posted G) on July 1, 1971 from the New York City to Tuckahoe, New York. As an incentive to its exempt employees (of which G was one) to report to work at the new location, it offered $30 additional permanent salary per month to each who would do just that. The offer was thus an executory contract. G by doing just that transformed it into a binding contract and submitted his claim on its prescribed form, which R promptly denied but granted to all other exempt employees (almost all of them white) and threatened to dismiss him should he bring the matter up once more. R continued to deny it to G to the last day of his salary payment

(June 5, 1972). On p.15, para.13 mention has been made of G's critical illness. Consequently G has been receiving since then 2/3rd of his "last salary" from R's insurer. But because of the denial of that extra $30 per month, it did not form a part of his "last salary". Hence he has since then been receiving from R's insurer every month $20 (2/3rd of $30) less than what he should be receiving, had he not been so discriminated by R. In addition, R is still refusing to make good that deficiency in his monthly income, even though the contract is still subsisting due to R's subrogation of it to its insurer. This fact constitutes an act of continuing discrimination.

Proceedings Before EEOC And NYSDHR

16. Proceedings Before The EEOC: R's false representation regarding an offer of a consulting position to G (pp.14-15, para.12), its continuing tort against G (pp.15-17, para.14) and its continuing breach of contract (pp.17-18, para.15), left him with no other avenue for an amicable settlement of the issues but the adversarial route. R thus compelled him

to file a charge on March 20, 1973 with the EEOC. But the EEOC negligently supplied him with two obsolete forms and thereby depriving him from an opportunity to present many vital details that would have had a crucial bearing upon its determination. As if the above illegality were not enough, the EEOC then (without even waiting to receive G's statutory affidavit and detailed charge, which the EEOC itself requested, and allowing him a reasonable time to submit them, and at the same time without even allowing the NYSDHR the statutory 60 days) mailed to him a form letter on April 12, 1973 informing G that his charge was untimely. G immediately protested and the EEOC agreed that the form letter was prematurely sent out to him. The EEOC then advised him to continue writing his affidavit and his detailed charge and assured him that upon their filing these would be carefully reviewed and the determination would be made accordingly. G filed them on October 9, 1973. But without even reading them, once again the EEOC issued the same illegal determination on its "NOTICE OF RIGHT TO SUE" on October 17, 1973 (Appendix I).

17. Proceedings Before The NYSDHR: The EEOC sent a copy of G's charge on March 20, 1973 to the NYSDHR, which recognized it as valid and timely under Section 297.5 of the NYSHRL. G filed a copy of his detailed charge on October 10, 1973. Since, however, by the time the NYSDHR considered the matter on October 30, 1973, G's suit was already filed (due to the EEOC's hasty, illegal and premature determination on October 17, 1973, and the Title VII allows only 90 days within which to file the suit), it had to suspend its jurisdiction during its pendency, as required by Section 297.9 of the NYSHRL. It has, however, assured G that it would resume its jurisdiction upon the termination of his suit without a justice.

Proceedings Before The SDNY

18. The Title VII Claim: G filed his suit on October 25, 1973 on the EEOC's standard complaint form and refiled on December 12, 1973 on the same form. The SDNY assigned it to Judge Tenney, but for unknown reason(s) reassigned it to Judge Owen ("J"), then newly appointed. J held two preliminary hearings on January 31,

1974 and on March 29, 1974 and scheduled the trial to be held on June 17, 1974, but cancelled it on June 6, 1974 due to his sojourn to Washington, D. C. Subsequently, thanks to R's dilatory motion practice and J's apparent acquiescence to such palpable practice, no trial was held.

19.1. The ADEA Claim: G was not aware of the existence of the ADEA until few days before the hearing on March 29, 1974. But honestly believing that the Title VII covered also the age discrimination, G stated it on the EEOC form on March 20, 1973. The EEOC did not object to that. On the contrary, it gratuitously advised him to include it in his detailed charge. It did not mention to him of the existence of the ADEA and direct him to go to the Wage and Hour Division ("WHD" of the U. S. Department of Labor, which administers the ADEA) on the same floor to initiate a separate proceedings thereunder. The EEOC was thus in the same position as an apparent agent is on behalf of an undisclosed principal in the Law of Contract. Hence a notice to such an ostensible agent is deemed to be a sufficient notice to his undisclosed principal.

2.As advised by the EEOC, G gave details of age discrimination in his detailed charge filed with the EEOC on October 9, 1973, which then related back to March 20, 1973, by virtue of Regulation 1601.11(b) of its Procedure. Accordingly, G complied with the notice requirement of Section 7(d) of the ADEA, as the EEOC was deemed to have received both the charges (containing, inter alia, the age discrimination) as the agent per pro the WHD. Moreover, both the charges were timely filed with the NYSDHR and thus met with the requirement of Section 14(b), read with Section 7(d)(2), of the ADEA.

3.The EEOC's standard complaint form itself provided a space to state the ADEA claim. Accordingly, G stated a valid and timely ADEA claim in his original and refiled complaints on October 25, 1973 and on December 12, 1973 respectively. Moreover, G delivered copies of both the complaints on the same dates to the EEOC personally. In fact, it even allowed G to make xerox copies thereof on its own machine at the Government expense to receive the copies thereof as the aforesaid agent of the WHD.

4.Furthermore, immediately upon learning of the existence of the ADEA, G telephoned to the WHD on March 25, 1974, but it declined to act on the ground that his age discrimination charge was then (and still is) pending with (but suspended by) the NYSDHR. Consequently, it had no power to act, by virtue of Section 14(a) of the ADEA. It also said that since the suit had already been filed, it doubted if it could act, in any event, and that there was no time (because of its own backlog) to assume its jurisdiction in time for a new suit to be filed within the statutory period of two years. In short, it waived its jurisdiction. Accordingly, G complied with Section 7(d) of the ADEA.

5.Not being a lawyer, G was not sure whether or not he stated his ADEA claim sufficiently for the purpose of his suit. So he stated it again in his motion of August 8, 1974 and in his rewritten complaint of July 7, 1975. His doubt was compounded by the fact that J never ruled as to the validity or otherwise of his ADEA claim and that R did not oppose it until 666 days later on October 14, 1975.

Thus, by J's and R's silence, G was prevented from curing defects, if any, in his ADEA claim within the statutory time.

20. 1981, 1983 And 13th Amendment Claims: Like the ADEA, G was not aware of the existence of the above until few days before the hearing on March 29, 1974. Not, however, knowing how to assert them, G tried unsuccessfully to learn it from J's clerk on April 4, 1974. It was only on June 6, 1974 G was able to learn it from J's another clerk. Thereupon G filed his motion on August 8, 1974 asserting the above, read with 28 U.S.C. §1343(4). However, due to J's continued silence and to R's lack of opposition thereto, G was not sure whether or not his motion had been placed before J (as the first filing was returned by the Postal Service unopened with a remark "REFUSED" by J's office and the SDNY admitted that it was done so in error). Because of J's and R's continued silence, G was not even sure whether or not his above assertion had been defective for any reason. He was naturally anxious to cure any such defect, if such had been the fact, within the 3 years allowed under Section

214(2) of the New York State Civil Practice Law and Rules and if necessary by a de novo suit in respect of the above captioned claims within the same statutory period. With that aim in view, G reminded J about it in his two subsequent motions of August 28, 1974 and of September 16, 1974. J's clerk convened a pre-trial "conference" to be held on September 27, 1974 for the sole purpose of hearing all the three motions - as the clerk put it:

> "to iron out various motions and to set a date for the trial to begin".

But during the hearing J did no such thing. In fact, at the outset J apologized for his inability to do so, as he was on his way out of the City for the weekend. J did, however, find enough time to rule on R's discovery motion, for which there was no statutory time limit, but not for G's timely motions, for which there was the aforesaid time limit and he was well aware of it. But he said nothing inspite of G's prayer. At the next hearing on May 2, 1975 J remained similarly silent on the aforesaid claims. On September 17, 1975 G filed his rewritten complaint of July 7, 1975 (the timing difference was due to G's

sudden recurrence of illness), in which G once more reminded J about his long asserted claims, by referring to his original motion of August 8, 1974. It was only then R opposed G's claims 432 days later on October 14, 1975. Once more J's clerk convened another hearing to be held on November 7, 1975 for the sole purpose of hearing G's above motion. Once more J did no such thing during the hearing and accordingly confined himself solely to the question of dismissal of G's suit and not of saving it by allowing the aforesaid timely asserted claims. It is, therefore, not at all surprising to find that such a judge should be claiming (albeit 375 days later on November 16, 1976 at the prodding of the CA2) that:

> "I denied the said motion sub silentio in granting the cross-motion to dismiss." and made it "nunc pro tunc."

(Appendix H, p.A-15) 827 days after G asserted his aforesaid claims on August 8, 1974 originally.

21. G's Rewritten Complaint: As has been briefly noted (para.3.3, p.4), G submitted it only to meet R's objection. On June 6, 1974 J's clerk told G that the

objection would be sufficient to dismiss the suit without any trial, unless a re-written complaint were submitted before the trial date. Accordingly, G prayed for it in his motion of August 8, 1974. Because of J's and R's silence thereon, G prayed for it again in his motions of Aug. 28, 1974 and of September 16, 1974. During the hearing on September 27, 1974 G prayed for it again, to which J said:

"I can't rule on that, until I see it".

Believing in good faith that J would be receptive to G's rewritten complaint, he began writing it. However, on November 1, 1974 R's attorney told G that, having already received G's detailed charge to the EEOC filed on October 9, 1973,

"there would be no need"

for any rewritten complaint. Relying thereon in good faith G did not submit it. However, after the hearing on May 2, 1975, G became apprehensive that J might dismiss his suit by merely upholding R's objection. So G submitted it, which contains no new fact but only the restatement of the same facts as in his original complaint. As has been noted (p.26,para. 20), during the hearing on November 7,

1975 J did not at all consider it - the original and the sole reason for convening the hearing by J's clerk.

22. R Never Submitted Brief In Contempt: During the hearing on March 29, 1974 J ordered both the parties to submit their respective briefs before the trial date of June 17, 1974. Since, however, the trial was cancelled on June 6, 1974, the date of its submission was accordingly changed to "as soon as possible" but "no rush". G submitted it on August 30, 1974 but R's attorney in an affidavit on May 6, 1976 stated that:

> "Defendants were not given additional time to submit a brief but rather submitted a brief in support of their motion for summary judgment when such motion was filed".

What R submitted on October 14, 1975 was, therefore, 564 days after J's order. In the absence of R's brief G was severely handicapped by being totally unaware of R's argument, case citations, etc. Furthermore, R deliberately submitted it so late, so as to overwhelm a non-lawyer like G at the last moment and thereby to catch G totally unprepared in presenting his opposition motion to the summary

judgment, and it did. Although G pointed it out in his opposition motion of November 3, 1975, but J, by his own admission (Appendix F), did not even read it. Even worse was that during the hearing on November 7, 1975, J remained silent to G's fervent plea against R's unconscionable laches and the lowest grade of courtroom advocacy practised by its attorneys.

23. R's Palpable Dilatory Motion Practice: The entire proceedings in the SDNY for 2 years can be summed up by the above caption. Inspite of G's depositions of 118 pages taken by R's attorney, R went after the discovery of G's detailed charge to the EEOC, containing the same but less detailed facts. Having discovered it and found nothing to challenge (in fact, R's attorney described it as "anticlimactic"), R then went after the discovery of R's own documents showing class discrimination, which was not then even an issue, as G's suit was then an individual one. Needless to say that R's palpable dilatory motion practice has imposed financial and physical hardships upon G. But J again lent his deaf ears to G's fervent plea during the hearing on Nov. 7, 1975.

24.1.J Imposed Arbitrary And Capricious Fine Upon G: The genesis of the fine was R's second discovery motion, seeking discovery of its own documents showing class discrimination. Because of its volume (6,882 pages), G prayed for reimbursement of his expenses in xerox copying and delivery thereof, which the magistrate (to whom J assigned it) readily recommended and J "so ordered" on December 11, 1974. But the SDNY negligently never sent to G a copy of J's order - not even its white postcard, informing its docketing. Moreover, it does not even give any information over the telephone to anyone who is not an admitted attorney retained on the case in question, and accordingly told G to come to the Courthouse personally and make a photocopy by himself. His continued illness, however, prevented him from visiting the Courthouse some 22 miles away. Hence G had no way of knowing whether or not J even had acted on the magistrate's recommendation, let alone J's order and the details of it. R's attorney, on the other hand, received a copy of J's order, but adamantly refused to mail a copy of it to G, on the ground that:

"each party is responsible to obtain his papers and cannot rely on the other party therefor".

This was contrary to a telephone advice by J's clerk on June 6, 1974 that:

"it is defense attorney's duty to keep you informed on his motion".

It would have cost R's attorney (who has a xerox machine in his firm, of which he is a partner with his father and others) no more than 20 cents in all to mail a copy of the order to G, who even offered to reimburse it to R's attorney. But the latter refused to do so, inspite of G's two requests on January 24, 1975 and on April 30, 1975. In passing we note that R's attorney similarly and adamantly refused to give G a copy of his own depositions and the matter came to such a pass that G had to bring it to J's attention. J then referred it to the magistrate, who sharply denounced R's attorney in failing to extend:

"a most customary legal courtesy".

2. Instead, in order to enrich himself R's attorney chose the most expensive route - yet another motion. In order to take advantage of G's illness, R filed it

on April 21, 1975, seeking only for the dismissal of the suit (and hoping to get it, in case of G's failure to appear at the hearing on May 2, 1975). G was then running 102°F temperature and taking massive doses of several prescription drugs. During the hearing J found that G did not in fact receive a copy of J's order and even admonished R's attorney that:

> "Now, I am going to suggest, counsel, that from now on when you get these that you serve by mail a copy on your adversary and this won't happen again".

But J then proceeded to impose an arbitrary and capricious fine of $50 upon G. If it were payable to the SDNY then the unjustness of such a fine perhaps would have been far less than if it were payable to the adversary. But lo J ordered G to pay the fine to a billion dollar corporation. R's cash hoard alone was then nearly quarter of a billion dollars and is now $266 million. R was then awashed with so much idle cash that it hired a Frenchman as its new president and paid him $1.5 million in cash just to report to work on the first day and now pays him a salary of nearly $700,000. But worse still was the fact that R did

not even seek any such fine or cost, however small in amount, either in its motion or during the hearing. J even refused to hear G's fervent plea of mitigating circumstances, by abruptly ending the hearing by saying that:

"I have made my ruling."

and then proceeded to hear other cases. In addition to the above arbitrary, capricious and unjust fine, J allowed G only 10 days within which to xerox copy 6,882 pages of documents and then to deliver them to R's attorney, on pain of dismissal of the suit. At the end of the remaining cases (and J retired into his chamber, where a merriment was then going on), G wished to speak to J to seek an extension of the time limit. But J even refused to see G. Thereafter G wrote a letter to J on May 6, 1975 seeking the same, but J again turned it down outright without any further ado.

25. <u>J Denied G's Class Action Outright</u>: After the discovery of R's documents, showing its class discrimination (which G delivered to R's attorney on June 11, 1975), the only logical thing for G to do was to pray for a leave to transform

his hitherto individual suit into a class action, which he did in his motion of July 7, 1975. But R did not oppose it on time - being late by 12 days. During the hearing on November 7, 1975 J not only remained silent to G's plea against R's belatedness, but also denied angrily G's prayer for a class action outright - without even hearing R's attorney, in fact by cutting the latter short in the middle of a sentence of what he was saying against it. Furthermore, J by his own admission (Appendix F) did not even consider G's motion of November 3, 1975, containing an extensive plea for a class action together with R's own documents, signed by its top corporate officers, unequivocally admitting its class discrimination since (at least) July 17, 1957. J's outright denial was all the more illogical (to say the least), since: (i) J gave no reason whatsoever; and (ii) G had stated the class nature of his charge ab initio to the EEOC on March 20, 1973 and on October 9, 1973, which related back to March 20, 1973 by virtue of Regulation 1601.11(b) of its Procedure. Such an ab initio class claim was held to be enough for a class action by many court cases.

26. J Refused To Remand To The EEOC: G prayed on two occasions to remand the case to the EEOC in order to ascertain the truth of his allegation that it had illegally or wrongfully dismissed his charge on October 17, 1973. On the first occasion on September 27, 1974 J said that:

> "I am not sure, if I have the power to do that".

On the second occasion on November 7, 1975 J said that:

> "I am sorry, I have no power to do that".

27. J Ignored G's Extenuating Circumstances: During the hearing on November 7, 1975 J did not call for any medical evidence (from R's own records) of G's inability to file his charge with the EEOC before March 20, 1973, so as to give G the slightest possible benefit of doubt as held in many civil rights cases. Even what J then heard was not by his own volition, but because G was compelled to draw J's attention thereto, as J apparently never read G's brief of August 28, 1974 and his opposition motion of November 3, 1975, both containing the facts.

28. R Procured Summary Judgment By Perjury And Subornation Of Perjury: R's motion for summary judgment was supported by a bogus "AFFIDAVIT" of one of its employees, who has had no "personal knowledge" in the subject matter. In fact, during the most crucial period of R's unlawful employment discrimination practices against G in 1967 and 1968, that putative "affiant" was not even an employee of R. Even after he joined R's employment from January 1969 (possibly in his first job after obtaining his B.S. degree) at no time he was concerned with employment discrimination matter, even in the slightest degree. Even more serious was, however, the fact that the same reputed "affiant" made several false statements in it, supposedly under oath. One such false statement was G's former titles (para.14, pp.15-17). Both the supposed "affiant" and R's attorney knew that the statement was false in material particular. In addition, the "AFFIDAVIT" appears to be a subornation of perjury and "Swern to before" R's attorney himself (who wrote it and typed it on his office typewriter, with the same 'legalese', sentences after sentences and even

paragraphs after paragraphs, and plethora of errors, as in all of his other papers). Even the signature of the "affiant" appears to be a forgery. But there is no signature by R's attorney - only his out of date rubber stamp (with the year having been altered in the same handwriting as the "affiant"). Although G pointed these out in his opposition motion of November 3, 1975, but J did not even read it (Appendix F). G again pointed these out during the hearing on November 7, 1975, but J remained stony silent.

29. <u>J Dismissed The Suit While R's Discovery Motion Was Still Going On</u>: Another serious false statement by the same "affiant" was that G's:

> "employment was terminated due to a reorganization plan just prior to the transfer to Paris of the U.S.V. (sic) International Finance Division".

R's own secret documents in G's possession show the statement to be absolutely false. Because of R's perjury, subornation of perjury and possibly also forgery, G was compelled to disclose the existence of the secret documents, while refuting the above quoted perjury. R's attorney immediately jumped upon it, as a drown-

ing man would catch a straw, and filed yet another discovery motion on November 6, 1975 (though untimely, it was docketed nevertheless; in a like situation the SDNY did not docket G's paper of April 24, 1975), and demanded the same during the hearing on November 7, 1975. Whereupon J ordered G that:

> "I am directing you within a week to turn these secret documents over to attorneys for Revlon, all right".

In order to enable G to do so, J then said that:

> "I am reserving decision on your motion and on Revlon's motion. Thank you very much".

But J on the same day (possibly right on the spot) dismissed his suit behind his back and thereby causing him a needless additional expense of $68.55 in xerox copying and delivery of the secret documents. R has refused to reimburse G's total out of pocket expenses of $532.99 in contempt of court.

30. J Denied G Outright To Reargue Or A New Trial: Not knowing the dismissal G wrote a letter-affidavit to J on December 10, 1975, citing then just published rul-

ing by the CA8, upholding the tolling of statutory periods for filings under the Title VII and the ADEA by extended employment status (para.10, p.13). R immediately disputed both the applicability of the new ruling and the extent of the period in question. Thus there was indeed "a genuine issue for trial". But J never ruled on it. So, upon learning on Dec. 18, 1975 of the dismissal on Nov. 7, 1975 (the delay in mailing the notification of it was due to the relocation of the Clerk's office and mechanization of its filing system), G filed on December 26, 1975 a motion for a new trial, which R never opposed. But J treated it as "a motion to reargue" and denied it at once on December 31, 1975 without any hearing and without any further ado (Appendix G).

31. G's Affidavits Under 28 U.S.C. §144: G filed "a timely and sufficient affidavit" under 28 U.S.C. §144 ("Bias or prejudice of judge") on April 30, 1976, followed by a supplementary affidavit on May 20, 1976, in order to bar J from taking any further action on the suit. R's attorney filed his "AFFIDAVIT IN OPPOSITION" on May 10, 1976. G replied it on June 7, 1976.

Renewal Of Proceedings Before The EEOC

32. G's Motion To Reopen EEOC Decision: Based on the CA8 ruling (para.30, p.38), G filed on December 22, 1975 a motion to reopen the original determination on October 17, 1973, followed by a supplementary motion filed on April 22, 1976. G mailed copies of these two motions to R on June 18, 1976. Both the motions are pending before the plenary EEOC.

Proceedings Before The Second Circuit

33. The First Appeal: Because of G's motion (para.32 supra), coupled with his illness, he filed only a very short interim brief in support of his appeal, in the hope of filing a fuller brief after the EEOC had decided on his motions. The CA2's pro se clerk, however, told him to submit only the reply brief combining with the points of his intended final brief,

> "otherwise it would be confusing to have too many briefs".

His reply cum final brief, however, became very long and took several months to write. G submitted it on October 4, 1976, but was denied by the Honorable Chief Judge Kaufman

> "in the form presented".

There was no more time left to submit a substitute brief of acceptable length before the oral argument on October 7, 1976. During the five minutes allotted to G to present his argument, it took full 2 minnutes just to point out that he had been handicapped greatly by the unexpected denial of his brief. The Honorable Chief Judge Kaufman then said that the Court had already obtained the pertinent facts of the case without that brief and that its bulk was a consideration in denying it. Its judgment (Appendix A), however, shows that the learned Court had assumed certain inaccurate facts, on the basis of which it rendered its opinion to G's detriment.

34. The First Petition For Rehearing: Because of the inaccurate facts, G filed, on November 13, 1976 his petition for a rehearing, and on November 16, 1976 a supplement thereto. While these were pending G was contemplating to file a petition for a writ of certiorari to this Court, as he was apprehensive that J would most likely to act negatively upon the remand, which he did at once (Appendix H), even before the issuance of the "Mandate" by

the CA2. J's hasty, illegal and premature action upon the remand, thus, foreclosed any opportunity to file a petition to this Court then instead of now. The CA2 denied a rehearing (Appendix C).

35. The Second Appeal: Thus, G was compelled to go through the fruitless ritual of the second appeal needlessly at great physical and financial hardships in his personal circumstances, and its outcome was a foregone conclusion. The CA2 once more assumed inaccurate facts (e.g., G's:

> "long delay in seeking to file his amended complaint,", p.A-7),

on the basis of which it rendered its second judgment (Appendix B).

36. The Second Petition For Rehearing: As the CA2 based its opinion not only on inaccurate facts, but also on erroneous laws, G filed his petition for a rehearing, seeking an en banc hearing based on several landmark decisions of this Court. But the CA2 denied it (Appendix D).

37. Summary: Thus, both the appeals as well as the two petitions for rehearings were merely a fruitless exercise of the FRAP, as the CA2's assumption of inaccurate facts vitiated them all.

REASONS FOR GRANTING THE WRIT

"Special And Important Reasons"

38. This case presents questions of exceptional national importance, not merely because it raises the question of "jurisdictional prerequisites" for a Title VII, ADEA, 13th Amendment, 1981 or 1983 claim, but also because it raises a much broader question of the access to the Federal Courts by the victims of unlawful employment discrimination by rich and powerful billion dollar multi-national corporations. These are the questions in which all the three branches of the Federal Government, as well as the public at large, are vitally interested. The depth of the public interest can be measured by the fact that the Honorable Chief Justice himself found it necessary to address to the same question, as reported in The New York Times, Wednesday, May 18, 1977 and commented editorially on Monday, May 23, 1977. In addition, there is the question of the 'law's delay' deliberately by R's attorney and, what is even worse, by J himself, to R's benefit (whether intended or not) and, by the same token, to G's detriment. The point has been succinctly

put by the Honorable Chief Justice Burger himself that:

> "People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible.",

as reported in The New York Times, Saturday, May 28, 1977. J's conduct of the case, however, has produced exactly opposite results - protracted and expensive, yet without any relief whatsoever. Lastly, but by no means the least, there is the pervasive question of judicial ethics involved in a situation where a judge persistently fails (perhaps intentionally) to rule on a timely vital motion (inspite of repeated supplication of the motion writer and inspite of a hearing convened ad hoc by his clerk and held) and then, at the prodding of his higher Court, claims 827 days later that he denied it, but only in his own mind, and then proceeds hastily, illegally and prematurely to make it "nunc pro tunc" to 1,071 days earlier - hastily because it thwarts the motion writer's right to petition for a writ of certiorari to this Court; illegally because of 28 U.S.C. §144; and prematurely because of the motion writer's

pending petition for a rehearing, and of the lack of "Mandate", by his higher Court. In short, the petition meets with the above criterion of Rule 19.1 of the Rules of the Supreme Court of the United States ("RSC").

Rule 19.1(b) Of The RSC

39. The petition also meets with each of the five criteria laid down by the above Rule. Rather than fitting the facts with the criteria, this petition will present the criteria in the context of the facts presented by each question. For this purpose, the criteria will be identified by their respective clause numbers. Thus, Rule 19.1(b)(1) will mean the first clause:

> " Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter;".

Rule 19.1(b)(5) will mean the last clause:

> "or has so far departed from .... court's power of supervision.".

If a question meets with two or more criteria, it will be so stated. The petition also presents questions in which the CA-2's two decisions on this case are in conflict with its own earlier decisions.

The Title VII Claim

40. The "Jurisdictional Prerequisites": The question (4.A., p.5) meets with the criteria not only of Rule 19.1(b)(1) and (3) of the RSC, but also under the last sentence of para.39, p.45. G submitted his arguments in his brief of August 28, 1974, but neither of the lower courts apparently ever read it. G presented even more forceful arguments in his brief of October 4, 1976, but CA2 denied it (para.33, pp.40-41). Hence its error.

41. The Gist Of G's Arguments: Under the amended Title VII, the only "jurisdictional prerequisite" now is the filing of the charge with the EEOC, timely or untimely. If the charge is timely then the EEOC must assume its jurisdiction thereon. If, on the other hand, the charge is untimely then the EEOC must dismiss it and issue its Notice of Right to Sue to the charging party, and if within 90 days a civil suit is filed in the USDC of competent jurisdiction, then all the "jurisdictional prerequisites" therefor have been complied with. That's all there is to it, as Section 706(f)(1) has been specifically created by the 1972

amending Act to redress the untimely filed charges. The accent is now on "voluntary conciliation", which by definition does not mean timely filing of a charge, as opposed to "voluntary compliance" under the original Section 706(e) of the Title VII, which signified timely filing of a charge (since the EEOC lacked, and still lacks, power if the charge were untimely filed). See "Employment Practices Guide", Volume 1 of Commerce Clearing House, Inc. ("CCH"), Chicago. This "important question" meets with the criterion of Rule 19.1(b)(3) of the RSC:

> "or has decided an important question of federal law which has not been, but should be, settled by this court;".

42. Even Timely Filing Brings No Relief: Even assuming (argüendo, that is) that the timely filing of a charge with the EEOC is a "jurisdictional prerequisite" for a suit, as a practical matter, what good is it if such a timely filing receives no redress by the EEOC for years? It is a matter of public record that the EEOC is unable to discharge its statutory duties, having regard to its present astronomical backlog of cases. For example,

in G's own case his motion to reopen has been pending since December 22, 1975 (p. 40, para.32) and it will take, at least, that long from now just to decide whether or not the EEOC would be willing to re-open its original determination.

43. Congressional Intent: If one argues that the Congress, nevertheless, intended to create "a jurisdictional bar" against an untimely filed charge, let he (or she) be reminded that the Congress also intended to remedy all forms of employment discrimination from the land by whatever means - the EEOC or the Federal Courts. So the question now is which of the two takes the precedence - the narrow technicality or the broad Congressional intent. This is yet another "important question" that meets with the criterion of Rule 19-.1(b)(3) of the RSC. Luckily, the Congress itself has partly answered it:

> "In short, the Commission does not hold the key to the courtroom door. .... A complainant has an absolute right to go into court, and this provision does not affect that right at all."

per Senator Javits (Vol.110 Cong. Rec. 14191, June 17, 1964) quoted in Hall v. Werthan Bag Corp., 251 F.Supp.184 (1966).

> "The individual may proceed in his own right at any time. He may take his complaint to the Commission, he may bypass the Commission, or he may go directly to court."

per Senator Humphrey (op.cit., p.13694). Thus the Congressional philosophy has always been the open-courtroom-door (literally borrowing from 28 U.S.C. §452 - "Courts always open"). Indeed, this Court recognized the issue in its landmark decision in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968):

> "When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law."

at p.401 and quoted in Voutsis v. Union Carbide Corp., 452 F.2d 887 (CA2, 1971).

44. " ... the still-open question ...": Indeed, the CA2 itself (Honorable Chief Judge Kaufman, the late Mr. Justice Tom Clark of this Court and Timbers, C.J.) recognized:

> "... the still-open question of whether these time requirements for filing with the agency are "jurisdictional prerequisites" to suit in the Federal Courts."

in Egelston v. State University College at Geneseo, 76-7047, June 7, 1976; 12 EPD 11,004, p.4741, footnote 5 (citations omitted; the words "with the agency" are in italics). EPD = "Employment Practices Decisions" published by CCH. It was, therefore, an error for the same Court (presided by the same distinguished Chief Judge) to treat the present case at bar as if "the still-open question" were already well settled, by holding that:

> "The failure to file timely charges with the EEOC was, of course, a jurisdictional bar to this proceeding as well. Weise v. Syracuse University, 522 F.2d 397, 411-12 (2d Cir. 1975)."

(Appendix A, p.A-3), only 4 months later.

45. The Doctrine Of Equitable Estoppel: The question also meets with the criterion of Rule 19.1(b)(1) of the RSC, since the CA2 "has rendered a decision in conflict with the decision of" the CA5 in Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (1975), which was also quoted by the CA2 in the Egelston case, as a part of its above footnote 5. The Reeb decision contains a brilliant and scholarly analysis of the above doctrine. Although G pointed out the above conflict

(and also that of para.44 supra) in his petition of November 13, 1976 for a rehearing, but was denied (Appendix C). If the doctrine were applied to the present case, the filing of G's charge with the EEOC on March 20, 1973 would have been found to be timely. See also Noble v. University of Rochester, 76-7133, CA2, June 7, 1976; 12 EPD 11,005 - the companion case of the Egelston case.

46. The Tolling Of Statutory Periods: Again argüendo that if the timely filing of a charge with the EEOC is a "jurisdictional prerequisite" for a suit, then, surely the statutory period for filing it was tolled by the following events:

(A) Extended Employee Status: The question meets with the criterion of Rule 19-.1(b)(1) of the RSC, since the CA2 "has rendered a decision in conflict with the decision of" the CA8 in Moses v. Falstaff Brewing Corp., 525 F.2d 92 (November 4, 1975), which has held that the statutory period, within which to serve the notice to the Secretary of Labor under the ADEA or to file a charge with the EEOC, is tolled by the claimant's extended employee status (because of his or her sever-

ance pay, vacation pay and other fringe benefit of the employer concerned). The Moses ruling would, therefore, have sustained G's filing of his charge with the EEOC on March 20, 1973 as timely. Hence, it was an abuse of discretion to deny G outright to reargue or a new trial based on the Moses ruling (para.30, pp.38-39), particularly where there was "a genuine issue for trial" within the meaning of Rule 56(e) of the FRCP. On the same ground, the summary judgment was illegal, since the Moses ruling was published prior to the summary judgment on November 7, 1975. The least J could have done was to vacate it and to hold a new trial, or at least to allow the parties to reargue. In fact, in the hope of challenging J's illegal denial of a new trial or at least of a reargument, G had to pay the appeal fee of $50 twice. It was, therefore, an error for the CA2 to overlook J's illegality. Indeed, lest it might do just that, G pleaded the above facts specifically (as his reply brief was denied - para.33, pp.40-41) during the remaining 3 minutes of his oral argument on October 7, 1976 and again in his petition on November 13, 1976 for a rehearing.

(B) "Undiscoverable Acts": This question also meets with the criterion of Rule 19.-1(b)(1) of the RSC, as the above captioned principle was upheld by the CA5 in the Reeb case (para.45, p.50) and by several other jurisdictions in earlier cases, and by the EEOC itself in several cases (e.g., Case No. LA 68-4-538E, June 16, 1969; CCH's EEOC Decisions (1973), §6125, pp. 4222-4224). Lest the CA2 might overlook the facts (para.12, p.14), as his reply brief was denied (para.33, pp.40-41), G stated it specifically during the remaining 3 minutes of his oral argument on October 7, 1976. It was, therefore, an error by the CA2 to overlook those facts.

(C) Hiring Of Replacement: This is a question which conflicts with the CA2's own decisions in the Egelston (p.50) and Noble (p.51) cases, and thus meets with the criterion of Rule 19.1(b)(5) of the RSC:

> "or has so far departed from the accepted and usual course of judicial proceedings, ... , as to call for an exercise of this court's power of supervision".

In G's own case, he became aware of R's filling up of his former position (by promoting a white, unqualified, less senior younger man) from Xmas card from his for-

mer supervisor on December 24, 1974. In fact, in the Noble case the CA2 stretched the tolling period until the replacement was not merely hired, but also actually on the job after receiving a lengthy training. In other words, the CA2 bent the law, on the principle that 'where there is a will, there is a law', so as to give Miss Noble a 'noble victory' and "a day in court" (The New York Times, Tuesday, June 8, 1976). G, however, did not expect the CA2 to accommodate him so 'nobly', but expected only "the accepted and usual course of judicial proceedings" of applying the same noble standard, it so eloquently established in the Egelston case only four months earlier, to his own case. Indeed, he prayed precisely that during the 3 minutes of his oral argument on October 7, 1976 and again in his petition on November 13, 1976 for a rehearing. It was, therefore, an error by the CA2 in failing to apply its own recent ruling to the present case at bar. Such a failure was all the more ironic, since the CA2 itself recognized a possibility that Dr. Egelston might fail to prove her allegation - a possibility that does not exist in G's case, in which the very act of

hiring of his replacement - without anything more - proves his allegation. It is like the "res ipsa loquiter" (thing itself proves) of the Law of Tort.

(D) Allegation Of Class Discrimination: This question is similar to the preceding one. The CA2 in the Egelston and Noble cases has held that the above captioned allegation in the charge to the EEOC is like the allegation of continuing discrimination and is accordingly timely whenever made. The EEOC itself has upheld the principle in several cases (e.g., 72-1702, April 26, 1972; CCH's EEOC Decisions (1973), §6361, pp.4649-4652). In G's case, he made such an allegation to the EEOC in his charge on March 20, 1973 and in his detailed charge and his statutory affidavit on October 9, 1973. The last two related back to March 20, 1973, by virtue of Regulation 1601.11(b) of its Procedure. Moreover, G did even better than what Egelston and Noble did. G submitted R's own documents (signed by its top corporate officers) admitting such class discrimination. It was, therefore, an error by the CA2 in failing to apply its own rulings to the present case.

(E) Charge Of Continuing Discrimination: Again, this question is exactly like the preceding one - both emanating from the Egelston and Noble rulings by the CA2. The principle has been upheld by many other USDCs and USCAs, and by the EEOC itself (e.g., 72-1884, May 31, 1972; CCH's EEOC Decisions (1973), §6378, pp. 4705-4711). In each of these cases, the filing of the charge with the EEOC was found to be timely by reason of continuing discrimination alleged therein. In G's case, he made such allegation to the EEOC in his detailed charge and statutory affidavit on October 9, 1973, which then related back to the date of the original filing on March 20, 1973, by virtue of Regulation 1601.11(b) of its Procedure. In fact, G could have alleged it on March 20, 1973, but for the EEOC's negligence in supplying him with obsolete forms (p. 19, para.16). He alleged it in all of his relevant court papers ab initio and orally on November 7, 1975, October 7, 1976 and April 25, 1977. It was, therefore, an error by the CA2 to overlook all of these crucial facts and to fail to apply its own recent rulings as above to G's case as well.

(E) Charge Of Continuing Discrimination: Again, this question is exactly like the preceding one - both emanating from the Egelston and Noble rulings by the CA2. The principle has been upheld by many other USDCs and USCAs, and by the EEOC itself (e.g., 72-1884, May 31, 1972; CCH's EEOC Decisions (1973), §6378, pp. 4705-4711). In each of these cases, the filing of the charge with the EEOC was found to be timely by reason of continuing discrimination alleged therein. In G's case, he made such allegation to the EEOC in his detailed charge and statutory affidavit on October 9, 1973, which then related back to the date of the original filing on March 20, 1973, by virtue of Regulation 1601.11(b) of its Procedure. In fact, G could have alleged it on March 20, 1973, but for the EEOC's negligence in supplying him with obsolete forms (p. 19, para.16). He alleged it in all of his relevant court papers ab initio and orally on November 7, 1975, October 7, 1976 and April 25, 1977. It was, therefore, an error by the CA2 to overlook all of these crucial facts and to fail to apply its own recent rulings as above to G's case as well.

(F) R Requested Time To Settle Amicably: This is yet another question which meets with the criterion of Rule 19.1(b)(1) of the RSC, in that the CA2 "has rendered a decision in conflict with the decision of" the CA5 in Culpepper v. Reynolds Metals Co., 421 F.2d 888 (1970), which held that the statutory filing period is tolled once an employee invokes his contractual grievance remedies in a constructive effort to seek a private settlement of his complaint. In G's case (para.11, p.14), the statute was tolled at R's express wish. Thus, it was akin to the "volenti non fit injuria" (a volunteer cannot complain of injury) of the Law of Tort. G pleaded the aforesaid facts during the remaining 3 minutes of his oral argument on October 7, 1976, as the CA2 denied his reply brief (para.33, pp.40-41). It was, therefore, an error by the CA2 to overlook this fundamental principle of law.

(G) State Charge Timely Filed: The question meets with 4 of the five criteria of Rule 19.1(b) of the RSC. In Love v. Pullman Co., 404 U.S. 522 (1972) the Honorable Mr. Justice Stewart held (4 EPD 7623):

"A person claiming to be aggrieved by

> a violation of Title VII of the Civil Rights Act of 1964 may not maintain a suit for redress in Federal District Court until he has first unsuccessfully pursued certain avenues of potential administrative relief." (p.5436).

Since G similarly "has first unsuccessfully pursued certain avenues of potential administrative relief" (paras.16-17, pp.18-20), the CA2's decision is, therefore, clearly "in conflict with applicable decisions of this court;", and thus meets with the criterion of Rule 19.1(b)(4) of the RSC. The CA2's decision is also in conflict with its own in the Voutsis case (p.49 ante; 4 EPD 7592):

> "The system of remedies is a complementary one, with the federal remedy designed to be available after the state remedy has been tried without producing speedy results." (p.5351, 4 EPD).

In G's case "the state remedy has been tried without producing" any result, let alone "speedy results" because of the EEOC's hasty, illegal and premature determination on October 17, 1973 (para.17, p. 20), without even allowing the NYSDHR the statutory 60 days required by Section 706 (b) and (c) of the Title VII. Accordingly, it meets with the criterion of Rule 19.1(b)(5) of the RSC. It also meets

with the criterion of Rule 19.1(b)(1) of the RSC, inasmuch as the CA2's decision is in conflict with the decisions of the CA3 and CA5. In addition, it meets with the criterion of Rule 19.1(b)(5) of the RSC for the second time and on both the counts (viz., the CA2 and the SDNY), in that both the Courts assumed G's failure:

> "to properly pursue his administrative remedies before the EEOC and the appropriate state agency," (p.A-4),

which is no where in the records. G alleged in all of his relevant papers (from his original complaint of October 25, 1973 to his petition on November 13, 1976 for a rehearing) and during the two oral arguments on October 7, 1976 and on April 25, 1977 that he filed a valid and timely charge with the NYSDHR. Thus the CA2:

> "has so far departed from the accepted and usual course of judicial proceedings," and has
>
> "so far sanctioned such a departure by" the SDNY,
>
> "as to call for ..... supervision.".

The decision is also in conflict with Section 297.9 of the NYSHRL (para.17, p.20). Because of the suspension of jurisdiction of the NYSDHR and of the State courts,

no court in the New York State can entertain G's complaint based on the same facts filed with the NYSDHR. The Section allows either a court relief or the NYSDHR proceedings at the outset, but suspends both in case of "any action in a court of competent jurisdiction" (Federal or another State) to avoid "duplicate relief" (recognized in the Voutsis case). Hence the justice requires that G should have been, but was not, afforded a relief by the SDNY. Such a denial by the SDNY and the CA2 was all the more unjust, as G was deprived from obtaining any relief from the NYSDHR only because of the hasty, illegal and premature determination by the EEOC on Oct. 17, 1973. Thus, the CA2:

> "has decided an important state .. question in a way in conflict with applicable state .. law;" Rule 19.1(b)(2) of RSC.

(H) G's Extenuating Circumstances: This question meets with the criterion of Rule 19.1(b)(3) of the RSC (p.47). There is not a single case (reported so far in CCH's EPDs - G's only source of reference) that fits with the facts of G's case (p. 15, para.13). The nearest to it is, however, Crouch v. UPI, 74 Civ. 296, SDNY,

August 20, 1975; 10 EPD 10,393, which upheld the tolling (where a murderer committed to a mental hospital, but never adjudged insane, for over 3 years was allowed to claim under the Title VII, on the principle that 'where there is a will, there is a law' - p.54).

(I) R's Continuing Tort Against G: This is yet another unsettled question, which meets with the criterion of Rule 19.1(b)(3) of the RSC. Two cases decided so far and the nearest to G's case are (i) Tarvesian v. Carr Division of TRW, Inc., USDC, Mass., 407 F.Supp.336 (1975); 11 EPD 10,928; and (ii) Moore v. Bank of New Orleans, USDC, ED, La., 75-2144, December 24, 1975; 11 EPD 10,946, and both upheld the tolling in situations lot weaker than G's case (para.14, pp.15-17).

(J) R's Continuing Breach Of Contract: This is also an unsettled question as the preceding one and thus meets with the same criterion of Rule 19.1(b)(3) of the RSC. The only case decided so far and the nearest to G's case (para.15, pp.17-18) is Suttle v. Exxon Co., U.S.A., USDC, MD, Fla., 75-674 Civ. T-K, November 30, 1976; 13 EPD 11,528. The subtle question

in the Suttle case was simply this:

> "The critical issue here is whether plaintiff could have suffered any of the effects of his alleged pre-April 1 continuing discrimination after his disability removed him from defend ant's active workforce." (pp.6894-5).

In G's case, the above test has been met, since he has suffered, and is still suffering, from the effect of R's discrimination against him prior to his dismissal, after his disability removed him from R's active workforce.

47. The Statutory Filing Period: As G filed his charge with the NYSDHR "within one year after the alleged unlawful discriminatory practice.", as required by Section 297.5 of the NYSHRL, the statutory period within which to file the charge with the EEOC was accordingly 300 days. Even R never disputed it. It was, therefore an error by the CA2 to assume that the applicable period was limited to 180 days (p.A-3). The error was probably due to its assumption that G did not file his charge with the NYSDHR timely (p.59).

48. G's Employment Termination Date: It was similarly an error by the CA2 thereon (p.A-3). See paras.9-10, p.13.

"Sub Silentio Denial Nunc Pro Tunc"

49. Foman v. Davis, 371 U.S. 178 (1962): The question 4.B. (pp.5-6) meets with the criteria of Rule 19.1(b)(1), (4) and (5) of the RSC, which are discussed below in order of their relative importance. The first is (4), on which we have the above ruling. The Honorable Mr. Justice Goldberg, giving the unanimous opinion, said:

> " ...., the amendment would have done no more than state an alternative theory for recovery.
>
> .... If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. —the leave sought should, as the rules require, be "freely given". Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." (p.182).

G relied on the above ruling for his petition on May 13, 1977 for a rehearing en banc, but the CA2 denied it without giving any reason whatsoever therefor (p.A-9).

50. "In the absence of any apparent or declared reason": In G's case there was such "absence", for not just few days or months but nearly 3 years (827 days).

51. "outright refusal to grant the leave without any justifying reason appearing for the denial": In G's case this was also so - (i) "outright" because J denied it literally so, without any hearing at any time during the 827 days, without even waiting to receive the "Mandate" under Rule 41(a) of the FRAP (para.34, p.41), and without even allowing G any time to file his petition for a writ of certiorari to this Court under Rule 41(b) of the FRAP, while G's timely petition for a rehearing was then pending before the CA2; and (ii) "without any justifying reason" because the very act (more correctly 'non-act') of "sub silentio" is, by definition, the very antithesis of "any justifying reason appearing". Indeed, J acted illegally. Thus, J's conduct of the case was no less lawless than Mr. Nixon's conduct.

52. The Judicial Ethics Of "sub silentio denial nunc pro tunc": The "sub silentio" conduct as an expression of assent or dissent, whether from the Bench or in commerce, had never been a part of our law, even during its formative period:

> "for the devil himself knows not the the thought of man",

as the Chief Justice Brian of England aptly observed in 1477. Thus, the question meets with the criterion of Rule 19-.1(b)(5) of the RSC.

53. 5th Amendment: "due process of law": In Societe Internationale v. Rogers, 357 U.S. 197 (citing Hoven v. Elliott, 167 U. S. 409 and Hammond Packing Co. v. The State of Arkansas, 212 U.S. 322) this Court held:

> "These decisions established that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity of a hearing on the merits of his cause." (p.209).

The words "hearing on the merits" are in italics. In G's case there was such a dismissal. Thus, the question meets with the criteria of Rule 19.1(b)(4) and (5) of the RSC.

54. J's Grave Misconduct From The Bench: J was fully aware that G was a non-lawyer and had no benefit of any legal counsel (hence not knowing what to do next) and that the statute of limitation was running against his claims asserted on August 8, 1974. Thus, J had a positive duty to speak up loud and clear the simple two-letter word "no" during the hearing on September 27, 1974 (which was convened by his clerk for the sole purpose of hearing G's aforesaid claims), even while he was hurriedly on his way out. That would have given G a notice to file a separate suit in respect of the same claims, based on the same facts as in the original complaint. It would, of course, have been expensive to do so, and more so by an unaffluent plaintiff like G, but at least it would have been a way to meet J's denial. During the hearing J even found time to give gratuitous legal advice to R's attorney about procuring a summary judgment. J similarly gave legal advice to R's attorney on March 29, 1974 about the discovery motion procedure before a U. S. magistrate. Both of them were in a low voice and esoteric, lawyer-to-lawyer communications.

55. Rules 1, 18(a) And 42(a) Of FRCP: But J obviously did not find enough time merely to utter the one syllable word "no" (the easiest and the earliest sound the homo sapiens learnt). Hence not at all knowing that J had an animus to deny G's motion of August 8, 1974 "sub silentio nunc pro tunc", G did not file a separate suit, against which G was further discouraged by Rules 18(a) and 42(a) of the FRCP. G's challenge against J's "sub silentio denial nunc pro tunc" is, however, grounded on more fundamental principle of justice than the aforesaid fact. G in good faith trusted upon J's fair-mindedness. Because of that implicit good faith and trust, G hoped that J would follow the imperative command of Rule 1 of the FRCP:

> "They shall be construed to secure the just, speedy and inexpensive determination of every action".

This fundamental principle of justice was applied by this Court in its Foman ruling (para.49, p.63). The same principle was the theme of the Honorable Chief Justice Burger's recent address (p.44). J, however, lamentably violated all the 3 requirements of this cardinal rule inten-

tionally. J denied G not only any justice and a speedy trial, but also an "inexpensive determination" of his case. In fact, J's conduct (or, more correctly, 'non-conduct') of the case has already cost G over $3,000 (even without any lawyer's fee and even before any trial held), which G could least afford.

56. J Flouted Title VII's Mandate For A Speedy Trial: Section 706(f)(5) of the Title VII (introduced by the 1972 amending Act) commands that:

> "It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited".

J, however, openly flouted it. Indeed, there was absolutely no reason why J could not have decided on September 27, 1974 what he decided on November 7, 1975. Had he done so, then G could have filed immediately a separate suit in respect of his claims asserted on August 8, 1974 long before the expiry of the statutory period therefor and his motion to reopen (para.32, p.40). But J did not do so, with intent to prevent G from doing just that and thereby to defeat his rights.

57. Rules 8(e) And 15(a) Of The FRCP: It is important to bear in mind that Rule 15(a) of (or indeed anywhere in) the FRCP offers no guidance as to the form, if any, a prayer for a leave to amend a complaint should take. Certainly, nowhere in the FRCP there is even a hint that such a prayer should be accompanied with a completely rewritten complaint, however long. Our only guidance is Rule 8(e) of the FRCP, which provides, inter alia, that:

> "(1) .... No technical forms of pleading or motions are required.
>
> (2) .... When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable or maritime grounds".

Accordingly, G complied with all there was to it, in seeking a leave to amend his complaint in his motion of August 8, 1974.

58. Rule 8(f) Of The FRCP: It expressly commands that:

> "CONSTRUCTION OF PLEADINGS. All plead-

> ings shall be so construed as to do substantial justice".

This Court invoked the above fundamental principle of justice in its landmark decision in Conley v. Gibson, 355 U.S. 41 (1957), which in turn was invoked in the Foman decision (para.49, p.63). J, however, failed to do any justice, let alone a "substantial justice", inspite of the fact that G cited the Conley decision in his brief of August 28, 1974, which neither of the lower courts apparently ever read (para.40, p.46).

59. The Doctrine Of "Notice Pleading": The doctrine was also invoked in the Conley decision by this Court. In G's case, assuming (again argüendo) that even if his prayer for a leave on August 8, 1974 were defective in any way, nevertheless, it served as the "notice pleading", which R did not even oppose (not even at the hearing on September 27, 1974) until 432 days later on October 14, 1975 (p.26). According to Moore's "Federal Practice":

> " .... a request made in open court puts the adverse party on notice of the nature and purpose of the request. Christensson v. Hogdal (CA DC 1952) 199 F2d 402, 405 n 5, 17 FR Serv 15a.-24, Case 3, citing Treatise." (p.972).

60. G's Alleged "extended and undue delay": A reference has been made (p.41, para.33) that the CA2 assumed certain incorrect facts (on the basis of which it rendered its opinion to G's detriment), one of which was G's supposed "extended and undue delay" (p.A-5), which the CA2 repeated in its second judgment (p.A-7), inspite of his many submissions (November 13, 1976, February 1, 1977, April 13, 1977 and May 13, 1977, and orally on April 25, 1977). Thus, the aforesaid was not based on "any apparent or declared reason" (following the Foman ruling - p. 63, para.49) by the SDNY and accordingly it was an error by the CA2 to assume as if it were a finding of the SDNY. Even if it were true (again argüendo), nevertheless, G prayed for the leave to amend his complaint long before the expiry of the statutory period, since the law does not command its filing by a certain day (or even as soon as possible), but merely commands the filing at any time within the statutory period. Moore comments:

> "if jurisdiction did in fact exist at the commencement of the action, then leave should be freely granted to cure the failure to allege jurisdiction properly." (p.945).

61. Consequence Of Failure To Exercise Discretion: Even a failure to exercise discretion amounts to an "abuse" (= "ab" + "use"). The dictionary meaning of "ab" is "from", "away", "off", etc. - Webster. Hence "abuse" means "misuse" or "nonuse". Professor Moore comments (p.896):

> "Northwest Orient Airlines v. Gorter (CA 9th, 1958) 254 F2d 652 (reversal due to trial court's failure to exercise its discretion freely). .....
>
> Lone Star Motor Import, Inc. v. Citroen Cars Corp. (CA 5th, 1961) 288 F2d 69, 4 FR Serv2d 15a.24, Case 2 (Where no grounds whatsoever existed to deny leave to amend, this satisfied the test for abuse of discretion and dismissal of the action was therefore reversed. ....).
>
> Reversal for abuse of discretion where leave to amend denied: .....
>
> South Suburban Safeway Lines, Inc., v. Carcards, Inc. (CA 2d, 1958) 256 F2d 934, 1 FR Serv2d 15a.24, Case 2 (outright dismissal for reasons not going to the merits is viewed with disfavor in federal courts); ....".

62. "sub silentio" Is A Two-Edged Sword: The doctrine of "sub silentio" cuts both ways, like a two-edged sword - the "denial" (as J claims), as well as the "consent", for the simple reason that when the silence is construed as being the e-

quivalent to a speech, it can be for the "yes" as well as for the "no". This is the measure of risk which the party remaining silent takes. See Battle v. The National Bank of Cleveland, USDC, ND, O, 364 F.Supp. 416 September 25, 1973; 6 EPD 8893, p.5812, footnote 2. In accordance with the Battle ruling, the fact that G timely prayed for the leave to amend his complaint on August 8, 1974, which R never opposed, was sufficient to dispense with the leave requirement of Rule 15(a) of the FRCP. See p.106 post for fnt. 2.

63. The Quality Of "sub silentio": The quality (or rather lack of it) of J's "sub silentio denial nunc pro tunc" must also be considered. Such a denial was so inaudible (like the infra-sound inaudible to the human ears) that even a highly perceptive jurist with over 3 decades on the Bench like the Honorable Chief Judge Kaufman of the CA2 had difficulty in hearing it, when he questioned R's attorney during the oral argument on October 7, 1976 by saying that:

> "we don't know what was in the judge's mind".

If this had been the case with one of the

country's most distinguished jurists, how much more difficult it must have been for a layman (unassisted by any lawyer) to know whether or not J's "sub silentio" posture meant an allowance or denial of G's prayer for a leave to amend his complaint, so as to file a separate suit in order to by-pass J's obstructionist justice within the statutory period.

64. No Trial Ever Took Place: Even the hearing for the summary dismissal took place 456 days after G sent his prayer on August 8, 1974 by Certified Mail Special Delivery. See Braddix v. Charles Todd, Inc., USDC, ED, Ill., 74-110-E, December 10, 1975; 11 EPD 10,611, p.6554.

65. R Unprejudiced By G's Alleged "extended and undue delay": There is an additional question of lack of prejudice to R by G's supposed "extended and undue delay" (para.60, p.71), or "long delay" (p. A-7), even if it were true, argüendo. In fact, R never showed any prejudice by G's delay, nor the SDNY or the CA2 ever so alleged. On the contrary, R's attorney readily agreed with G on January 24, 1975 over the telephone that it was G who was being prejudiced by such delay. Inspite

of G's supplications of prejudice to his interest by such delay, J never took any notice of it. The question of prejudice to a party by delay is one of the most important one and applied by this Court in the Love case (p.57). The Court held:

> "The respondent makes no showing of prejudice to its interest." (p.522).

Professor Moore says (p.901) that:

> " ... while laches and unexcused delay may bar a proposed amendment, the mere fact that an amendment is offered late in the case is not enough to bar it if the other party is not prejudiced."

In the footnote 10 to the above quotation Professor Moore (p.901) continues that:

> " Where announced reason for refusing to permit a plaintiff to amend his complaint during the hearing on a motion to dismiss and for summary judgment was that the motion came too late, such refusal was an abuse of discretion, and the cause would be remanded for trial. Lloyd v. United Liquors Corp. (CA6th, 1953) 203 F2d 789, 18 FR Serv 15a.24, Case 3".

In the above quoted case, there was, at least, an expressed denial. But in G's case, there was none for 827 days and he prayed for a leave to amend his complaint within the statutory period and long be-

fore the: (i) expiry of the statutory period under Section 214(2) of the New York State Civil Practice Law and Rules; (ii) trial, which was never held; and (iii) summary dismissal hearing on November 7, 1975. Professor Moore also says (p.902):

> "In evaluating claims of prejudice, whether claimed by reason of delay or otherwise, the possible prejudice to the moving party if the motion is denied may also be weighed".

In G's case, J did no such thing at any time during the 1,071 days the case was before him.

66. Rule 15(c) Of The FRCP: In all the questions presented above (paras.52-65, pp.65-76) the common web running through them is the fact that the CA2:

> "has so far departed from the accepted and usual course of judicial proceedings," and has "so far sanctioned such a departure by" the SDNY, "as to call for an exercise of this court's power of supervision.", Rule 19.1(b)(5) of RSC.

So, the questions meet with the criterion of the RSC. We will now present a question that meets with the criterion of Rule 19-.1(b)(1) of the RSC. The question is the Rule 15(c) of the FRCP in relation to a 1981 claim, which has been resolved in

Harkness v. Sweeny, CA5, 75-1533, July 1, 1977; 14 EPD 7669. The CA5 held:

> "Johnson v. Railway Express Agency, Inc., ... 421 U.S. 454, ... (1975), contrary to defendants' position, is not applicable to this case. Federal Rule of Civil Procedure 15(c) is. ..... "The purpose of [Rule 15(c)] is accomplished if the initial complaint gives the defendant fair notice that litigation is arising out of a specific factual situation". Longbottom v. Swaby, 397 F.2d 45, 48 (5th Cir. 1968). Such is precisely the situation here. ...
>
> This cause is now remanded to the trial court with directions to grant the Motion for Leave to Amend Second Amended Complaint in a manner consistent with this opinion, to enter judgment for plaintiffs in a manner consistent with this opinion, and for further proceedings not inconsistent with this opinion, including proceedings concerning the amount of back pay owed to plaintiffs and reasonable attorneys' fees." (p.5301, 14 EPD).

There are several other older decisions. In G's case the facts are identical to the above case. Thus, it was an error by the CA2 in not applying the same standard as above, more so on the second appeal.

67. J Induced A Cart Before The Horse Or A Dog In The Manger Stalemate: The CA2 implied that G should have waited (having already done so for 456 days) ad infinitum

like a tantalus for the granting of J's leave before submitting his rewritten complaint, when it said that:

> " ...., without receiving permission from the court, he proceeded to file an amended complaint." (p.A-3).

It is a reductio ad absurdum proposition. At best it is like putting a cart before the horse. At worst it is like a dog in manger story of the Aesop's fables. Both lead to long stalemate. How was it possible for G to receive the "permission", when J manifested his animus "sub silentio" to deny it? By submitting the rewritten complaint at least the long stalemate was at last broken to R's discomfiture. Once again it is a question that meets with the criterion of Rule 19.1(b)(5) of the RSC.

68. G's Rewritten Complaint: The CA2 incorrectly assumed (footnote 1, p.A-3):

> "Since appellant sought to plead new facts as well as new theories of law, the complaint was properly "supplemental" as well as "amended"".

As has been noted (para.21, pp.26-27) the rewritten complaint contains neither "new facts" nor "new theories of law". Hence it is a misnomer to describe it as above.

Even the supposed "new theories of law" in the rewritten complaint was merely a recapitulation of G's motion of August 8, 1974. It was, of course, simply there, because J hitherto persistently did not care. Similarly, G's class assertion in the rewritten complaint was merely a recapitulation of his original charge to the EEOC on March 20, 1973, detailed charge and the statutory affidavit on October 9, 1973 and the original and refiled complaints of October 25 and December 12, 1973 respectively. See para.25, pp.33-34 and p.55. Thus, there was nothing "new" in G's rewritten complaint and whatever there were must have been in the imagination of the CA2, because R falsely so claimed. It was this misapprehension by the CA2 that led it to assume G's "extended and undue delay" (para.60, p.71) in its first judgment (p.A-5) and "long delay" in its second judgment (p.A-7).

69. The EEOC's Deficient Complaint Form: Even assuming (again argüendo) that the allegations discussed in the preceding paragraph were true, nevertheless, G could well have asserted ab initio, what he did on August 8, 1974 or even on July 7, 1975,

if the EEOC's standard complaint form (which the EEOC supplied to G to file his suit - para.18, p.20) provided for it, or if the EEOC informed G of his rights under §1981. Accordingly, a layman claimant like G ought not to be penalized, if an independent Commission, specifically created by an Act of Congress to eradicate unlawful employment discrimination practices, fails in its statutory or moral duties. The culpability of the EEOC was all the more severe where it also hastily, illegally and prematurely dismissed G's charge (para.16, pp.18-19), which could well have been mitigated by informing G that although his charge had been "untimely", he could still file a separate suit under §1981. This is a question in which this Court's Love doctrine (p.57) is clearly applicable (p.5438, 4 EPD 7623):

> "Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process".

Even the CA2 itself in the Voutsis case (p.49) held:

> " ...., that the intent of Title VII is remedial and that plaintiffs under it should not be held accountable for a

procedural prescience that would have made a Baron Parke happy or a Joseph Chitty proud." (p.5349, 4 EPD 7592).

"To place unnecessary stumbling block in the private litigant's path, ..., would be hypertechnical and overly legalistic, and would improperly shield a discriminatory organization from the reach of civil litigation." (p.5349).

" The Congressional policy here sought to be enforced is one of eliminating employment discrimination, and the statutory enforcement scheme contemplates a resort to the federal remedy if the state machinery has proved inadequate. The federal remedy is independent and cumulative, ..., and it facilitates comprehensive relief." (p.5350, ibid; the citations and the two footnotes 7 and 8 omitted).

Similarly the SDNY itself in Smith v. UPI, 74 Civ. 555 JMC, June 18, 1974 held that:

" .... the Court must look upon the present pro se complaint with a liberal eye. Haines v. Kerner, 404 U.S. 519, 520-521 (1971)." (p.5283, 8 EPD 9512; the words pro se are in italics).

""To deny relief under these circumstances would be a meaningless triumph of form over substance.'" Choate v. Caterpillar Tractor Co., (1 EPD ¶9916) 402 F.2d 357, 360 ... (7th Cir. 1968)." (p.5284, ibid).

""Courts have been adamant in refusing to penalize Title VII plaintiffs for wrongs or mistakes committed by the EEOC. .... "" (p.5284, ibid).

"" After an aggrieved person, such as plaintiff in this case, has filed a charge and obtained his suit letter from the EEOC, he has done all that is expected of him prior to bringing suit. He has carried every burden which Title VII requires him to carry prior to suing in the district court."" (p.5284, ibid).

"To dismiss the instant action against this pro se plaintiff because of the Commission's failure ...., would be to visit upon him prejudice, which is not his due. Plaintiff has complied with all of the many vagaries of Title VII in order to reach the courthouse door. To now cast him down this building's steps without first affording him an opportunity to be heard, would so exalt form over substance as to weaken the foundations of our legal system." (p.5285, ibid; the words pro se are in italics).

"Court is mindful of the fact that the present complaint, as well as that made to the EEOC, is the product of an "unlettered" layman and is, therefore, entitled to broad construction in order that the remedial purposes of the Act be effectuated." (p.5286).

Although G submitted xerox copies of all the above 3 cases (viz., Love, Voutsis and Smith) with his brief of August 28, 1974, both the SDNY and the CA2 apparently completely disregarded it, but considered only R's brief (filed on October 14, 1975 - 564 days after J's order on March

29, 1974) in arriving at their respective decisions. The CA2's decisions were thus erroneous and meet with the criterion of Rule 19.1(b)(5) of the RSC once more.

70. Rule 61 Of The FRCP: Finally, another imperative command of the FRCP must be taken into account. Rule 61 commands that:

> "Harmless Error. ...., unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties".

But in G's case, J did exactly opposite. It was, therefore, an error for the CA2 to affirm J's hasty, illegal and premature "sub silentio denial nunc pro tunc". Accordingly, the question once again meets with the criterion of Rule 19.1(b)(5) of the RSC.

'Law Of The Case'

71. Bryan v. Austin, 354 U.S. 933 (1957): The questions C. and D. (p.6) are taken together. Following the Bryan ruling, the CA2 itself should have granted G's

prayer to amend his complaint [so as to allow him to include §1981, §1983 and the 13th Amendment, read with 28 U.S.C. 1343-(4), asserted by him on August 8, 1974 and repeated in his rewritten complaint of July 7, 1975, in support of the same facts and claims as in his original and refiled complaints of October 25 and December 12, 1973 respectively], as prayed in his petition of May 13, 1977 for a rehearing. Moore observes (p.969) that:

> " If, however, the appellate court finds a failure of jurisdiction because of defective jurisdictional allegations, where it appears that jurisdiction may actually exist, then it may itself grant the parties an opportunity to amend pleadings on appeal as a prerequisite to an appellate review of the merits of the case." (footnote 8 containing a long list of cases omitted).

Moore further observes (p.957) that:

> " In dismissing a complaint for failure to state a claim or for failure to show jurisdiction, the court should heed the admonition of Rule 15 and allow amendment "freely" if it appears at all possible that the plaintiff can correct the defect." (footnote 2 omitted, except the portion quoted below).
>
> " Abuse of discretion for trial court to deny leave to amend on granting motion to dismiss:".

The above quoted footnote heading is significant. Under it Moore cites a long list of cases, including that of the CA2, of which the South Suburban Safeway Lines has already been noted (para.61, p.72). It also contains two elucidating rulings by the CA2 itself in (Moore, p.957):

> "Neeff v. Emery Transp. Co. (CA2d, 1960) 284 F2d 432, 4 FR Serv2d 15a.24, Case 1;".
>
> "Downey v. Palmer (CCA2d, 1940) 114 F2d 116, 3 FR Serv 56c.312, Case 1 (court erred in dismissing complaint without leave to amend, while recognizing that cause of action might exist);".

In the same footnote Moore (p.958) says:

> "In Topping v. Fry (CCA7th, 1945) 147 F2d 715, Judge Sparks stated: "We think plaintiff should have been given an opportunity to clarify his complaint. The very deficiencies of the pleading seem to furnish all the more reason why it should not have been dismissed on defendants' motions without leave to amend. . . . Under the liberalized procedure provided for by the new rules, we think it is error to dismiss a complaint with prejudice if it appears that any relief could be granted on the facts stated. . . . As stated in Moore's Federal Practice, ..., 'Litigation is not an art in writing nice pleadings. It can and should seldom be settled on its merits at the pleading stage. . . .'".

G's case is stronger than that of the Downey or the Topping case, in that the CA2 itself (unlike the USDC in these two cases) established the 'law of the case'. It was, therefore, incumbent upon it to grant the leave by itself (particularly upon the second appeal), based on the simple proposition that 'where there is a right, there is (or must be found) a remedy'. Otherwise it would simply mean that the CA2 has established that G has a right, but has no remedy whatsoever therefor. Our system of jurisprudence never gave any countenance to this kind of proposition. Isn't it what the Declaration of Independence was all about? The colonial settlers found:

> " ...., that they are endowed by their Creator with certain unalienable Rights, ..." (the second paragraph),

but without remedies. So they created the remedies by founding this Republic. In this view, it was an error by the CA2 to hold that:

> " ...., we find no abuse of discretion in the district court's denial of leave to amend." (p.A-7),

as the very nature of the denial amounted to such abuse of discretion. See also

paras.49-53, pp.63-65. Accordingly, the question meets with the criteria of Rule 19.1(b)(1), (4) and (5) of the RSC.

Arbitrary, Capricious And Excessive Fine

72. Miller v. International Paper Co., 408 F.2d 283 (CA5, February 26, 1969): In that landmark decision (in which one of the judges was the present Attorney General Griffin B. Bell) the CA5 held:

> " .. we stated in B. F. Goodrich Tire Co. v. Lyster, "(a)lthough a trial judge's latitude in .. penalizing failures to comply is broad, his discretion is not limitless."[40] This court will not uphold the imposition of an unjustified penalty. The rules of civil procedure are designed to impose order upon complex and often chaotic judicial proceedings. The power which makes the rules work emanates from the district judge who, like a ringmaster, must occasionally use the prod. Excessive or fruitless use of the prod, however, is impermissible.
>
> In the circumstances of this case, we think the district court abused its discretion when it imposed cost and fee penalties upon the appellants. .. .... The whim of counsel and the strategy of obstruction have no recognized place in federal procedure.
>
> Being without justification, the imposition of a penalty upon the unaffluent appellants not only would cause un-

> due hardship but it would also undermine the policy of financially assisting complainants in Title VII suits. .... The penalty assessment, therefore, cannot stand.
>
> 40 328 F. 2d 411, 415 (5th Cir. 1964). See Bon Air Hotel, Inc. v. Time, Inc., 376 F. 2d 118, 121-22 (5th Cir. 1967)."
>
> (pp.1495-1496, 1 EPD 9968).

The xerox copies of the Miller case was submitted with G's brief of August 28, 1974, which both the courts below totally disregarded, as also all of his papers filed with the CA2. In the Miller case, where the appellants were advised by a long list of the nation's most distinguished pro bono público lawyers, the situation appears to have been far more compelling for the trial judge to impose the impugned fine than had been in G's case. Yet, the CA5 denounced the mere act of imposition as an abuse of discretion. In contrast, there was no compelling reason whatsoever in G's case (para. 24, pp.30-33) to impose the arbitrary and capricious fine, and the SDNY's transcript will prove that. Nevertheless, J imposed it, merely from the love of exercising his newly-found tremendous judicial power and from his personal bias or prejudice.

J had the added comfort that G had no lawyer (let alone Jack Greenberg, Julia P. Cooper, et al. in the Miller case) to oppose the fine on the spot or later.

73. 5th Amendment: "due process of law": The facts (pp.32-33) clearly show that J denied G his 5th Amendment right of "due process of law" not only during the hearing but also subsequently. The point of law has already been presented (para.53, p.65). Hence J's imposition of the fine was unconstitutional.

74. 8th Amendment: "excessive fines": The facts (pp.32-33) also clearly show that the fine was "excessive" within the meaning of the 8th Amendment, inasmuch as: (i) according to Webster "EXCESSIVE implies an amount or degree too great to be reasonable or acceptable;"; (ii) the Miller ruling (para.72, p.87) implied that in a Title VII suit the imposition of any amount of fine is "excessive"; (iii) R never prayed for any amount of fine or cost, however small; (iv) the fine was payable not to the SDNY, but to a billion dollar corporation, which then had nearly $250 million idle cash; and (v) the fine embarrassed even R, as it

instructed its outside attorney retained on this case not to press G for the payment of the fine on or before its due date of May 12, 1975, until G was ready to deliver xerox copies of the first batch of 2,479 pages of R's documents on June 11, 1975. The imposition of the fine was, therefore, unconstitutional. Indeed, on this ground alone this Court allowed a petition for a writ of certiorari to the CA9 in Cissna v. McQuaid, 74-482. The Clerk of this Court has kindly sent a copy of this petition to G as a sample. It is from this petition G has learnt of the unconstitutionality of J's refusal of the "due process of law" and imposition of the fine, and of the cases cited therein (para.53, p.65) relevant to his own case. It was, therefore, a grave error by the CA2 in not overturning J's imposition of the fine and summary dismissal of G's suit, inspite of G's repeated supplications therefor to the CA2. But worse still was the fact that at no time the CA2 had considered the question. Accordingly, the question E. on page 7 meets with the criteria of Rule 19.1(b)-(1), (4) and (5) of the RSC.

J Refused To Remand The Case To The EEOC

75. A "de novo" Trial: In Smith v. Universal Services, Inc., 454 F.2d 154, January 10, 1972, the CA5 held that:

> " ...., the action of the EEOC is not agency action of a quasi-judicial nature which determines the rights of the parties subject only to the possibility that the reviewing courts might conclude that the EEOC's actions are arbitrary, capricious or an abuse of discretion. Instead, the civil litigation at the district court level clearly takes on the character of a trial de novo, completely separate from the actions of the EEOC." (p.5420, 4 EPD 7617; citations omitted and the words de novo are in italics).

See also Jenkins v. United Gas Corp., 400 F.2d 28, August 29, 1968, in which the CA5 again held that a suit in a USDC is:

> " ... to launch a full scale inquiry into the charged unlawful motivation in employment practices." (p.1208, 1 EPD 9908),

and cited by the CA2 in the Voutsis case (p.5350, 4 EPD 7592). Thus, in the Smith case the CA5 implied that it is a duty of the USDC concerned to review the EEOC's determination so as to ascertain whether or not the latter had been "arbitrary, capricious or an abuse of discretion".

76. The CA2's Weise Ruling: But how can such a "de novo" trial take place, where a plaintiff him(her)self alleges illegality of the EEOC's determination? In other words, where the plaintiff has done the trial court's work, by pointing out that the EEOC's determination had been "arbitrary, capricious or an abuse of discretion", what is then the court's duty? The common sense would dictate that in such a situation only logical thing for the court to do is to remand the case to the EEOC to verify the truth or otherwise of the plaintiff's allegation. This is precisely what the CA2 itself sensibly recommended in its wise Weise decision (para.44, p.50) in the footnote 27:

> " An appropriate remedy in a case where the EEOC erroneously dismisses on jurisdictional grounds might ordinarily be a remand to the Commission. .... " (p.5208, 10 EPD 10,294).

77. J's Abuse Of Discretion In Refusing To Remand G's Case To The EEOC: The facts (para.26, p.35) clearly show that it was an "abuse" (para.61, p.72) of discretion by J in refusing to remand, particularly on November 7, 1975, as the Weise decision was out on July 14, 1975.

Moreover, J was (as he should be) fully aware of his newly-found tremendous judicial power conferred by Clause 1, Section 2, Article III of the Constitution:

> " The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, ...".

Hence J's excuse of lack of "The judicial Power", particularly on November 7, 1975, was not based on the Constitution and the Laws thereunder. If, on the other hand, J was not sure of his "Power" to remand G's case to the EEOC, the logic would dictate that J should have consulted with the Justice Department, before penalizing G. G had compelling reasons for wishing his case to be remanded to the EEOC. It was as early as on March 29, 1974 J prejudged the issues, before even receiving the briefs (para.22, pp.28-29). Hence G was genuinely apprehensive that J might dismiss his suit because of his "untimely charge", as alleged by the EEOC. In the hope that the EEOC would reverse its determination of October 17, 1973, if the case were remanded by the SDNY, G was irterested in the remand procedure. Of course, G could have requested the EEOC

directly to the same end (i.e., without the remand), which, in fact, he has (para.32, p.40), but it lacks the 'teeth' of a remand by a USDC. Thus, the question F. (p.7) meets with the criteria of Rule 19.1(b)(1) and (5) of the RSC.

78. EEOC's Hasty, Illegal And Premature Determination: The following acts by the EEOC have vitiated G's Title VII rights:

(a) supplied obsolete forms to G (p.19), in violation of its own Regulation 1601.-8; (b) denied the statutory 60 days to the NYSDHR (pp.19, 20 and 60), in violation of Section 706(c) of the Title VII; (c) arrived at its determination without even allowing G to submit his statutory affidavit (p.19), in violation of Section 706(b) of the Title VII; (d) arrived at its determination without even allowing G to file his detailed charge, which the EEOC itself required (p.19), in violation of its own Regulations 1601.11(b) (relation back) and 1601.19 (dismissal); and (e) issued its "NOTICE OF RIGHT TO SUE" prematurely while the matter was then still pending before the NYSDHR (pp.20 & 60), in violation of Section 706(c) of the Title VII and its own Regulation 1601.25.

The last illegality (viz., (e)) produced the following 'chain reaction':

(i) it compelled G to file his suit prematurely, while the matter was then still pending before the NYSDHR, to meet the deadline of 90 days under Section 706(f)-(1) of the Title VII; (ii) the filing of the suit automatically suspended the jurisdiction of the NYSDHR by virtue of Section 297.9 of the NYSHRL; (iii) the latter deprived the NYSDHR to arrive at its "final findings and orders" within the meaning of Section 706(b) of the Title VII; (iv) the latter in turn deprived the EEOC to "accord substantial weight to final findings and orders made by" the NYSDHR, as required by Section 706(b) of the Title VII; (v) the latter in turn influenced the EEOC to arrive at its determination; (vi) still later the latter influenced J to arrive at his decision; and (vii) finally, J's decision made the CA2 to arrive at its judgment.

The remand of the case to the EEOC, or even to the NYSDHR by a stay of proceedings, could well have cured the "jurisdictional bar" (p.50) that the CA2 mentioned in its first judgment (p.A-3).

G even prayed to the CA2 for a stay of proceedings following this Court's ruling in the Johnson case (pp.77; A-4):

> " .... the plaintiff in his §1981 suit may ask the court to stay proceedings until the administrative efforts at conciliation and voluntary compliance have been completed." - the Honorable Mr. Justice Blackmun (p.7674, 9 EPD 10,149).

But the CA2 apparently denied it without any hearing or reason. Indeed, the said learned Justice further held that:

> "Conciliation and persuasion through the administrative process, to be sure, often constitute a desirable approach to settlement of disputes based on sensitive and emotional charges of invidious employment discrimination." (p. 7673, 9 EPD 10,149).

The CA2's denial, therefore, nipped in the bud, so to speak, whatever fragile chance G had for an administrative settlement, and defeated the very spirit of this landmark decision, on which it relied in G's case. Accordingly, the question meets with the criterion of Rule 19.1(b)(4) of the RSC once more. It is interesting to note that at the SDNY, R objected to the incompleteness of the process by the NY-SDHR, but at the CA2, R objected to any resumption of it, and both were upheld.

The ADEA Claim

79. Timely Notice Of Intent To Sue: The facts (para.19, pp.21-24) clearly show that G filed with the EEOC and the WHD a valid and timely notice of intent to sue. Even R conceded that a "statutory notice to EEOC" was good enough. Hence the question was not to whom G should have served his notice - a question of law. It was simply a question of fact - "No statutory notice to EEOC or the Secretary of Labor was ever given.", as alleged by R. Such a factual question should have been, but was not, resolved by J, in dereliction of his judicial duties, inspite of G's two reminders of August 8, 1974 and of July 7, 1975. Thus it was a grave error by the CA2 to dismiss it simply by holding that:

> " ... we find Goss' other claims in the amended complaint to be without merit." (Appendix A, p.A-4).

G's ADEA claim in his rewritten complaint was simply there, because J hitherto did not care.

80. Shell Oil Co. v. Dartt, 76-678: G's case is quite similar to the above, which is now before this Court. In fact, G relied upon it, but the CA2 never considered

it (para.33, pp.40-41). Even assuming (argüendo, that is) that G's notice of intent to sue was untimely, but what good would it have been if the notice were timely, as R steadfastly: (i) failed to honor the solemn promise of its own CFO for an amicable settlement (paras.11-12, pp.14-15) - the very purpose of the notice, as the CA10 pointed out in Mrs. Dartt's case (p.5179, 12 EPD 11,119); and (ii) opposed stay of proceedings by the CA2 so as to enable the NYSDHR (which is empowered to conciliate age claim) to resume its jurisdiction (p.96)? Thus, the question G.(a)(i) on page 8 meets with the criteria of Rule 19.1(b)(1), (3) and (5) of the RSC.

J's Outright Denial Of A Class Action

81. J's Abuse Of Judicial Process: The facts (pp.33-34 and p.55) clearly show that J grossly abused the judicial process, as well as the Law of Evidence, by his denial. Just because G is not a lawyer (if it was J's reason for the denial) is really no ground for it, as R's own top corporate officers have done G's work by admitting class discrimination. What

more evidence does the Law of Evidence require? In addition, G has many thousands of pages of R's own documents, plus witnesses, proving it. Who then needs a lawyer to prove what R itself has done? Innumerable court decisions (including that of the SDNY) have upheld class actions in situations less favorable than in G's case. Thus it was an error by the CA2 to dismiss the issue "to be without merit." (para.79, p.97). See also Albemarle Paper Co. v. Moody, 422 U.S. 407, June 25, 1975. Hence the question G.(h) on page 9 meets with the criteria of Rule 19.1(b)(1), (4) and (5) of the RSC.

Summary Dismissal

82. J's Illegal Or Wrongful Dismissal: The questions G.(i) and (j) will be considered together, as these are closely related. First we consider the question (i). The facts thereto (para.28, pp.36-37) clearly show that the summary dismissal was illegal or wrongful under Rule 56 of the FRCP for the following reasons: (a) there was a "genuine issue" as to all material facts (e.g., paras.6-23, pp.12-29); (b) R was not "entitled to a judg-

ment as a matter of law", since R did not dispute any of the facts stated in its own documents (which were the basis of: G's allegation of class discrimination, and R's discovery motions); (c) indeed, it was G and his class who were "entitled to a judgment as a matter of law" on the same ground as (b) above; and (c) R made affidavit in "bad faith" (viz., the lack of "personal knowledge" of the putative "affiant"; his perjury; the subornation of perjury; a possible forgery; a sham notarization; etc.). The last mentioned white collar crime alone was sufficient for the former Lieutenant Governor and:

> "the first sitting judge in Connecticut history to be convicted" (The New York Times, Friday, September 10, 1976).

J simply ignored all these serious white collar crimes. Above all, the dismissal conflicts with the CA2's own decision in the Egelston case (p.50):

> "In our recent opinion in Heyman v. Commerce & Industry Ins. Co., 524 F.2d 1317, 1320 (2d Cir. 1975) we emphasized that summary judgment must be used sparingly "since its prophylactic function, when erercised, cuts off a party's right to present his case to the jury."" (p.4740, 12 EPD 11,004).

83. J Dismissed Suit During Discovery: The facts (para.29, pp.37-38) once more clearly show that J's dismissal of the suit, while R's discovery motion was still in motion, was a gross abuse of the judicial process. Indeed, the CA2 itself has condemned it in no uncertain manner in the Egelston case (in continuation of the quotation on page 100 ante):

> "Dismissal of a complaint—before any discovery has taken place or an answer filed—is even more drastic. It is a device that must not be employed unless, taking as true the allegations pleaded, Cooper v. Pate, 378 U.S. 546 (1964) it
>
> appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.
>
> Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), quoting Conley v. Gibson, [33 LC ¶71,077] 355 U.S. 41, 45-46 (1957)." (p.4740, 12 EPD 11,004).

84. R's Post-Discovery Disclosure: It was R's discovery of its own secret documents (para.29, pp.37-38) that compelled its "voluntary disclosure" reluctantly at last to the Securities and Exchange Commission (one of the last of the multi-national corporate titans to do so), which was widely reported in the press (e.g.,

The New York Times, Tuesday, October 5, 1976). It proves G's allegation of R's:

> "(.. corporate lawlessness on a multi-national scale)." (p.9, Nov. 3, 1975).

It also refutes the impugned sworn statement (p.37) by the putative "affiant" in his bogus "AFFIDAVIT IN SUPPORT OF CROSS-MOTION" (para.28, pp.36-37). Although G pointed out the above facts during the 1 minute reply argument on October 7, 1976, the CA2 apparently gave no weight to it.

85. The 'slightest doubt' Rule: It was applied in Woodford v. Kinney Shoe Corp., ND, Ga., 369 F.Supp. 911, Feb. 22, 1973:

> "Defendant has the burden of positively and clearly demonstrating that there is no genuine issue of fact and that it is entitled to judgment as a matter of law. "A long line of cases have held that summary judgment should not be granted if there is the 'slightest doubt' as to the facts." National Screen Service Corp. v. Poster Exch., Inc., 305 F. 2d 647 (5th Cir. 1962)." (p.7151, 7 EPD 9239),

and cited by the CA10 in the Dartt case (p.5178, 12 EPD 11,119), which is now being reviewed by this Court (para.80, pp. 97-98). The fact that J said that:

> "I am going to reserve decision on these motions." (transcript page 5),

clearly proved that J had more than "the 'slightest doubt' as to the facts.". In fact, the wording suggests that J had a good deal of it. Indeed, if J had less than "the 'slightest doubt' as to the facts.", then he would: (i) have dismissed the suit during (and not after) the hearing, and (ii) not have granted R's discovery motion on its secret documents, as after the dismissal the latter would have been of no evidentiary value to R against G. Moreover, "the 'slightest doubt'" must be "as to the facts" - all "facts" and not merely one "fact" - and not 'as to the laws'. Furthermore, how could J not have had "the 'slightest doubt' as to the facts." when he did not even care, by his own admission, to consider G's vital opposition motion of November 3, 1975 (pp. 34, 37), to which several affidavits by R's top corporate officers conclusively proving G's allegations were attached. As if to exclude "the 'slightest doubt' as to the facts." that J might have read G's motion before his summary dismissal, J signed it on November 10, 1975 (p.A-12). Thus the latter was a "decree pro confesso" (mentioned on p.13 of Cissna's petition - p.90 ante).

86. Jaroslawicz v. Seedman, CA2, The New York Times, Saturday, December 20, 1975: In that widely reported case, the Honorable Chief Judge Kaufman with the concurrence of the Honorable Circuit Judges Wilfred Feinberg and J. Joseph Smith reversed the summary dismissal by the late (obituary in The New York Times, Wednesday, October 13, 1976) Chief Judge of the EDNY Walter Bruchhausen, holding:

> "that the dismissal had been unwarranted, because a summary judgment required establishing that there were "no genuine issues of material facts" for trial, but that "Seedman's own words have created an issue of fact concerning his good faith."" (as reported by The Times reporter Arnold H. Lubasch).

The above quotation could be paraphrased to meet G's situation, by simply substituting the word "Seedman's" by "R's". As has been pointed out (para.84, p.102), it was R's false allegation under oath (p. 37) that created an issue of material fact and of its good faith. But the CA2 obviously did not apply its own ruling to G's case, inspite of his supplications. Hence its decisions were clearly erroneous. Accordingly, the questions G.(i) and (j) on page 9 meet with the criteria of Rule 19.1(b)(1), (4) and (5) of the RSC.

Denial Of Reargument Or New Trial

87. J's Abuse Of Judicial Process: The facts (para.30, pp. 38-39) clearly show that it was an abuse of judicial process to deny either a reargument or a new trial, since: (i) G's motion for a new trial was based on the new principle of law established by the CA8 in the Moses case (para.46.(A), pp.51-52) and by the CA2 itself in the Jaroslawicz case (para.86, p.104); (ii) R's letter (p.39) created "a genuine issue for trial"; (iii) J dismissed G's motion "outright" in violation of the Foman ruling (para.49, pp.63-64); and (iv) G's motion also contained yet another reminder to the SDNY of his timely claims under the ADEA, 1981, 1983 and the 13th Amendment read with 28 U.S.C. § 1343(4). It was, therefore, an error by the CA2 to disregard all these overwhelming facts, particularly when G had to pay the appeal fee twice (p.52) - because of the SDNY's incorrect advice to G on the filing of notice of appeal under Rule 4(a) of the FRAP - just to challenge J's denial. Accordingly, the question G.(k) on pp.9-10 meets with the criteria of Rule 19.1(b)(4) and (5) of the RSC.

The 13th Amendment And §1983 Claims

88. The 13th Amendment Claim: As has been stated in the question G.(a)(ii) on page 8, R never opposed the assertion of G's above claim on August 8, 1974 and reiterated on July 7, 1975 (para.20, pp.24-26). Thus, following the Battle ruling:

> " In filing its motion to dismiss plaintiff's complaint, defendant made no objection to plaintiff's allegations setting forth a cause of action under 42 USC § 1782. The Court has difficulty perceiving the applicability of this statute to the subject matter of this case. Being unchallenged, however, it remains an asserted cause of action in this suit." (footnote 2, p.5812, 6 EPD 8893), on p.73 ante,

G asserted a valid cause of action. It was an abuse of judicial process for the SDNY to ignore it completely. It was, therefore, an error by the CA2 to dismiss it "to be without merit", similar to his ADEA claim (p.97) or class claim (p.99).

89. §1983 Claim: Like G's 1981 claim, R opposed his 1983 claim 432 days later (para.20, pp.24-26). Hence the Battle ruling is equally applicable here. Thus, these two questions meet with the criterion of Rule 19.1(b)(5) of the RSC.

90. J's Prejudicial Remarks From The Bench: The question H. on page 10 is the hardest of all, since it gives no pleasure to allege personal bias or prejudice against any judge, let alone one of J's fine caliber, as he is a scholar and a gentleman, and a man of unfailing courtesies. We are, however, considering only the facts, and not J's personal qualities which are in no way in question here. J made such prejudicial remarks from the Bench on March 29, 1974 and on November 7, 1975, which clearly revealed the inner working of his mind. His remark on the second occasion was particularly objectionable to G's interest. Even before the start of the recorded portion of the hearing on November 7, 1975, J chuckled and addressed to R's attorney:

> "What about jurisdictional prerequisites?".

R's attorney then replied that the suit lacked jurisdictional prerequisites. J then chuckled again and still addressing R's attorney:

> "Only the other day I dismissed a suit

for failure to file a timely charge with the EEOC".

The fact that J made the above remark, without even reading G's vital papers (G's brief of August 28, 1974 and opposition motion of November 3, 1975), clearly shows that J approached both the suits with a foregone conclusion as to the so called "jurisdictional prerequisites" - a tendency of the USDC judges that was commented upon by the CA5 in the Reeb decision (p.50 ante; see p.5488, 10 EPD 10,358). A further proof of J's above approach was provided by J himself during the hearing on March 29, 1974. Thereat, without being asked by J to do so, R's attorney told J that the suit lacked the jurisdictional prerequisites, as a timely charge had not been filed by G with the EEOC. Realizing that J was not asking G any question thereon, G was obliged to speak out uninvitedly, probably by interrupting either J or R's attorney, that the timely filing of the charge with the EEOC was no longer a jurisdictional prerequisite for the suit. J then remarked:

"I don't know, if you can say that.",

emphasizing upon the words "say that",

with some sign of annoyance in his otherwise restrained tone. The incident once more clearly suggests that J harbored an 'obsession' as to the so called "jurisdictional prerequisites" for the suit. Hence J was apparently annoyed to hear a 'heresy' and did not ask G as to the basis of his contrary contention.

91. J's Profound Pro-employer Bias: The SDNY records clearly demonstrate J's persistent and protracted pro-employer bias. In fact, J has been vehemently denounced by the labor movement in a front page news in The New York Times, Wednesday, May 25, 1977 for his patently pro-employer pronouncement in the New York Telephone Company v. Communication Workers of America. Such a profound personal bias should disqualify a judge from hearing a case in question, but, perturbingly enough, J did not do so. On the contrary, J's actions and inactions unmistakably demonstrate his obsession with R's interest only, as if it were an ex parte suit filed by R. No one, of course, denies that a judge has no duty to protect the legitimate interest of the defendant(s). But the obsession therefor is a different kettle of fish.

92. J's Procrastination In Putting G's Case To Trial: Ever since J cancelled on June 6, 1974 the trial scheduled to have been held on June 17, 1974, J manifested his persistent procrastination in putting the case on his calendar. His reluctance can be evinced from the following telephone conversation with his clerk on July 19, 1974 (his clerk speaking to G):

> "It is upto the discretion of the judge to set the hearing date for trial of the case. So far as I know, I think that the question of trial of your case would automatically come up after the U. S. Magistrate's ruling on the defense motion".

Although the U. S. Magistrate issued his ruling on July 31, 1974, J never set another trial date. On the contrary, J continued to show his alacrity to grant all of R's discovery motions, however palpably dilatory or spurious, possibly in the hope that the case would "go away". J's predilection has been accurately characterized in an article, entitled "Lawyers Proliferate and Prosper", in The New York Times, Sunday, January 25, 1976, on page 7 of Section 3 (Business and Finance), in which the author, Ernest Dickinson, quoting Professor Victor Kramer of

the Georgetown Law Center in Washington, D. C., wrote that:

> " The law's costly delay. It's not just the volume of litigation that is responsible for this, says Professor Kramer, but also "the tendency of judges to let cases drag on hoping they'll go away. As the size of the judiciary increases, the quality lowers. Some of the finest people in the world who end up on the benches today shouldn't be there because they don't want to judge. They don't want to decide anything".

93. "a barrage of post-trial motions": It was J's patently personal bias or prejudice (paras.90-92, pp.107-111) that impelled G to file his affidavit under 28 U.S.C. §144 on April 30, 1976, which was further elaborated (as the statute requires) by his supplementary affidavit on May 20, 1976. G's reply affidavit of June 7, 1976 was necessitated by R's "AFFIDAVIT IN OPPOSITION" filed on May 10, 1976. G's citation-affidavit of June 10, 1976 was similarly necessitated by R's contempt of court (para.22, pp.28-29 and para.29, p.38), dilatory motion practice (para.23, p.29) and other serious white-collar crimes (paras.28-29, pp.36-37 and para.84, pp.101-102), as a result of which the Federal law enforcement agencies have

began their respective criminal investigations. Thus, it is these 4 affidavits that the CA2 has characterized as "a barrage". Surely, such a description must be a flight of literary fancy, rather than a reality. Moreover, the word "post-trial" must be read as 'post-dismissal', since the trial was never held. Furthermore, the plural "motions" must be read in singular, as G filed just that - his motion for a new trial on December 26, 1975 (para.30, pp.38-39 and para.87, p. 105).

94. G's Affidavits Under 28 U.S.C. §144: G filed the two affidavits under 28 U.S. C. §144 (para.31, p.39) not because of the above facts (paras.90-92, pp.107-111) but because of his genuine apprehension that upon the remand of the case by the CA2 J might dismiss his suit again. Subsequent event proved that J did just that. It was, therefore, an error by the CA2 to remand the case to J, instead of another judge, as it did in the Egelston (p.50) and the Noble (p.51) cases (footnotes 6 and 4 respectively - pp.4741 and 4743 of 12 EPD). But much more important than that is the fact that the statute is quite

specific in disqualifying a judge once "a timely and sufficient affidavit" has been filed, by commanding that:

> " ...., such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding".

Consequently, the CA2's remand to J was no less illegal than J's action thereon. The illegality was all the more reprehensible, since G wrote a letter to the SD-NY's Pro Se Clerk on June 7, 1976 (a copy of which was sent to R's attorneys) with a view to prevent any further vindictive action by J upon the remand of the case. Thus, it was a grave miscarriage of justice by the CA2 not only to ignore G's written and oral pleas of his affidavits, but also to affirm J's illegal "MEMORANDUM AND ORDER" of November 16, 1976, as if nothing were amiss. The question H. on page 10, therefore, meets with the criterion of Rule 19.1(b)(5) of the RSC.

J Denied Before The "Mandate" Was Issued

95. Rule 41(a) And (b) Of The FRAP: The facts (paras.34 and 51, pp.41-42 and 64) clearly demonstrates the illegality of J's hasty, premature and vindictive denial of

November 16, 1976, since Rule 41(a) is quite specific:

> "The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. .... The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order".

Hence the earliest date on or after which the SDNY could have assigned the case to another judge upon the remand was December 28, 1976, which would then have given G enough time to file his petition for a writ of certiorari to this Court, and a far less complicated one (of no more than 30 pages) at that. J's hasty, illegal, premature and vindictive denial precluded G from availing himself of any opportunity to present his contemplated earlier petition to this Court, and thereby deprived him of his invaluable right under Rule 41(b). In consequence, G was compelled to go through his fruitless second appeal (para.35, p.42). So, the question I (p. 10) meets with the criterion of Rule 19.-1(b)(5) of the RSC.

The Question Of Equity

96. G Did Not 'Sleep On His Rights': Finally, we come to the question G.(1) on page 10. The facts clearly establish that G did not 'sleep on his rights' but asserted them at the earliest possible opportunity to do so. In Burnett v. New York Central Railroad Co., 380 U.S. 424 (1965) this Court held that:

> " Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes promote justice by preventing surprises and revival of claims that have been allowed to slumber until evidence has been lost, memories faded . . . " (p.428).
>
> " . . . the policy behind statutes of limitations is outweighed when the interests of justice require vindication of the plaintiff rights." (p.427).

See also Minnesota Mining and Manufacturing Co. v. New Jersey Wood Co., 381 U.S. 311 (1964). Both the cases were cited by the CA5 in the Culpepper case (p.57 ante - p.530 of 2 EPD 10,138).

97. Civil Rights Claims Are Viewed With Liberal Eyes: The cases are legion - see Burnett (supra), Love (p.57), Culpepper (supra), Miller (p.87), Reeb (p.50), Moses (p.51), to name only few already cited.

The SDNY too has its fair share of such cases - e.g., the Smith case (p.81), to name only one already cited. Similarly, the CA2 has its even larger share of such cases - e.g., the Voutsis (pp.80-81), the Weise (p.50), the Egelston (ibid) and the Noble (p.51) cases, to name only those already cited. Its wise Weise decision, on which it relied in G's case (p.50), is particularly worth quoting here:

> "The procedures ... exist not for their own sake, but rather in furtherance of substantive purposes: the promotion of dispute resolution through accommodation rather than litigation, ... Therefore, ..., the rigid insistence on meticulous observance of technicalities unrelated to substantive purpose is inappropriate." (p.5205, 10 EPD 10,294).

98. CA2's 'Double Standard Of Justice':

In the Egelston case the CA2 espoused:

> " Occasionally, there is a tendency on the part of a judge to attempt to avoid a trial where it appears to him ab initio that the trial might be a waste of time or of no avail to the plaintiff. With the crowded dockets and delay occasioned by oppressive judicial workloads, a judge may well overlook the fact that a complaint states a valid cause of action or, out of a desire to eliminate an action which he considers frivolous, dismiss it before the curtain has risen on the case. Such con-

ditions may have impelled Judge Burke to dismiss Dr. Judy Egelston's Title VII complaint upon its face and without more. But it is important that we emphasize the principle that our concern for efficiency must never be permitted to outweigh our concern for individual rights—particularly when the bare allegations of a complaint, read in a light most favorable to the plaintiff, (as we must at this posture of the case) state a valid claim. Accordingly, we reverse the dismissal and remand for further proceedings." (p.4739 of 12 EPD 11,004).

" There is an additional factor equally vital to the resolution of this case. Title VII is rife with procedural requirements which are sufficiently labyrinthine to baffle the most experienced lawyer, yet its enforcement mechanisms are usually triggered by laymen. Were we to interpret the statute's procedural prerequisites stringently, the ultimate result would be to shield illegal discrimination from the reach of the Act. Prior decisions, both of the Supreme Court[2] and of this Circuit[3] have, for this reason, taken a flexible stance in interpreting Title VII's procedural provisions. We follow this realistic approach today." (p.4740).

"2 .., Love ... We note that Congress has subsequently approved of the approach taken in Love v. Pullman. ...
3 .., Weise ..; Voutsis ..." (pp.4740-4741 of 12 EPD 11,004).

Although J's dismissal of G's suit was strikingly alike, the CA2 did not apply the above lofty principle to his case.

Unfortunately for G, the CA2's seemingly 'double standard of justice' did not just stop there. Please sample this: the CA2 found that Egelston (p.4739, 12 EPD 11,004):

> "states a valid cause of action", as she "filed a charge with the Office of Federal Contract Compliance (OFCC).",

even though the OFCC has no statutory existence, save an Executive Order, and the OFCC had nothing whatsoever to do with her charge. In contrast, the CA2 offhand dismissed G's ADEA claim "to be without merit." (p.97) merely because G initially gave the statutory notice to the EEOC instead of the WHD due to his honest belief (p.21), when R itself acknowledged that a notice to the either was enough (p.97) and J himself uttered not a single audible sound or word thereon. Moreover, if the notice to the OFCC was enough in the above case, surely, G's notice to the EEOC must be regarded as 'even better', since the EEOC's statutory business is to receive such notice, in contrast to the OFCC. The real point, though, is not to whom G gave his statutory notice, but whether such notice reached R within the statutory 300 days (p.98). Furthermore, R's hostility made any conciliation effort by the WHD

absolutely impossible (p.98). Hence no practical purpose would have served even if G had given his statutory notice to the WHD (instead of the EEOC) on March 20, 1973. The CA2 obviously missed all these points in not applying its own decisions to G's case.

99. J's 'Double Standard Of Justice': Following the CA2's lead in the Egelston and the Noble cases, even J himself admirably advocated in his scholarly opinion (his first on a Title VII suit reported in CCH's EPD) in Brisbane v. Port Authority of New York and New Jersey, 76 Civ. 1548, June 15, 1976; 12 EPD 11,059:

> " As an equitable matter, the balance is heavily in plaintiff's favor. ... In contrast, defendant cannot reasonably claim any prejudice.
>
> Quite apart from their intrinsic appeal, these equities are significant in interpreting the meaning of Title VII[5]." (p.4939 of 12 EPD 11,059).
>
> " 5 As the Fifth Circuit has stated: "We must ever be mindful that the provisions of Title VII were not designed for the sophisticated or the cognoscenti...." Sanchez v. Standard Brands, Inc., [2 EPD ¶10,252] 431 F.2d 455, 463 (5th Cir. 1970). It is a statutory scheme designed for laymen participation. Love v. Pullman Co., [4 EPD ¶ 7623] 404 U.S. 522, 527 (1972)." (p. 4940 of 12 EPD 11,059).

But J did not think fit to apply the same high-minded principle to G's case only 7 months earlier, when all of the above (except the Egelston and the Noble) decisions had been in existence. The EEOC's 'double standard of justice' has already been considered (para.46.(B), (D) and (E), pp.53, 55 and 56). It is the 'double standard of justice' practised by all the 3 layers of justice below (viz., the EEOC, the SDNY and the CA2) that alone calls for a review by this Court, as the questions G.(1) and the others remaining (pp.8-10) meet with the criterion of Rule 19.1(b)(5) of the RSC.

CONCLUSION

100. For the foregoing reasons, the EEOC's determination, the SDNY's memoranda orders and the CA2's 2 judgments, should either be summarily reversed or a writ of certiorari be granted.

Respectfully submitted,

Kenil K. Goss

Kenil K. Goss

Kenil K. Goss
Plaintiff-Appellant-
Petitioner Pro Se
21 Fairview Avenue
Tuckahoe, N. Y. 10707

A-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. .....

KENIL K. GOSS, Plaintiff-Appellant-
Petitioner Pro Se

v.

REVLON, INC. and its wholly owned subsidiary, USV PHARMACEUTICAL CORPORATION,
Defendants-Appellees-Respondents

APPENDIX

K. K. GOSS
THE GENTRY, APARTMENT 618
21 FAIRVIEW AVENUE
TUCKAHOE, WESTCHESTER, N. Y. 10707

TELEPHONE (914) 793-4661

A-2

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 20, 21—September Term, 1976.

(Argued October 7, 1976 Decided October 29, 1976.)

Docket Nos. 76-7015, 76-7065

KENIL K. GOSS,

Plaintiff-Appellant,

v.

REVLON, INC. and Its Wholly Owned Subsidiary,
USV PHARMACEUTICAL CORPORATION,

Defendants-Appellees.

Before:

KAUFMAN, *Chief Judge,*
MANSFIELD and MESKILL, *Circuit Judges.*

Appeal from order of the United States District Court for the Southern District of New York, Richard Owen, *Judge,* dismissing appellant's complaint alleging employment discrimination under Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* Plaintiff had sought leave to amend to add cause of action, among others, under Civil Rights Act of 1866, 42 U.S.C. § 1981; the district court improperly failed to rule on that motion. The case is remanded to the district court for a determination on the issue of leave to amend.

Affirmed in part; remanded in part.

KENIL K. Goss, Westchester, New York, *for Appellant Pro Se.*

DAVID GREENE, New York, New York (Martin C. Greene, Aberman & Greene, New York, New York, of counsel), *for Appellees.*

PER CURIAM:

This is a *pro se* action seeking reinstatement and damages for alleged employment discrimination. Appellant Kenil Goss was employed by USV Pharmaceutical Corporation, a wholly owned subsidiary of Revlon, until March 7, 1972, when he was dismissed. He filed charges with the Equal Employment Opportunity Commission ("EEOC") on March 20, 1973, more than six months after the expiration of the 180 day period of limitations provided for by statute. 42 U.S.C. § 2000e-5(e). The claim was thus dismissed as untimely. Disappointed with the administrative process, appellant began an action in the United States District Court for the Southern District of New York in December, 1973, seeking relief under Title VII of The Civil Rights Act of 1964, 42 U.S.C. § 2000, *et seq.* The failure to file timely charges with the EEOC was, of course, a jurisdictional bar to this proceeding as well. *Weise* v. *Syracuse University*, 522 F.2d 397, 411-12 (2d Cir. 1975).

Appellant sought leave to amend his complaint in accordance with Fed. R. Civ. P. 15(a), on three occasions, the last time on September 18, 1974. On September 22, 1975, without receiving permission from the court, he proceeded to file an amended complaint. In it, he alleged myriad new causes of action, under 42 U.S.C. §§ 1981, 1983, 29 U.S.C. § 621 and the Thirteenth Amendment; in addition, he moved for class action status.[1] The appellees,

1 Since appellant sought to plead new facts as well as new theories of law, the complaint was properly "supplemental" as well as "amended."

citing the jurisdictional bar and claiming that Goss failed to state a cause of action, submitted a cross-motion requesting dismissal of the original complaint, which Judge Owen granted by memo endorsement. Appellant subsequently let loose a barrage of post-trial motions, all of them meritless. Because the record does not indicate that the district court ruled on the motion for leave to amend, we must examine appellant's amended complaint to determine if it properly states a claim for relief. We will discuss only the § 1981 claim inasmuch as we find Goss' other claims in the amended complaint to be without merit.

42 U.S.C. § 1981 provides a related remedy to Title VII for private discrimination in employment. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975). Although parallel to Title VII, and directed in part at the same illegal practices, § 1981 was not preempted by Title VII, but continues in full force and effect. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47-49 (1974). Moreover, the failure of a claimant to properly pursue his administrative remedies before the EEOC and the appropriate state agency, as happened here, does not preclude him from instituting an action under § 1981. *See Macklin* v. *Spector Freight Systems*, 478 F.2d 979, 996-97 (D.C. Cir. 1973). Thus, appellant's failure to meet the jurisdictional requirements of Title VII does not preclude his cause of action under § 1981.

At the outset, we note that inasmuch as the claim under 42 U.S.C. § 1981 arises out of the same "transaction or occurrence" set forth in the original complaint, it would relate back, for purposes of the statute of limitations, under Fed. R. Civ. P. 15(c). Since the original complaint was filed within the applicable three-year statute of limitations, *Thomas Kaiser* v. *Cahn*, 510 F.2d 282, 284 (2d Cir. 1974), the § 1981 claim would itself be timely. Therefore, if the

amended complaint was allowed, it would state a timely § 1981 cause of action.

It may be that Judge Owen in granting the cross-motion to dismiss intended, *sub silentio,* to deny Goss' motion for leave to amend.[2] While Rule 15(a) commands that such leave is to be freely given, denial of leave to amend in this case would not be an abuse of discretion. The appellant, in seeking to add myriad new claims, advances no reason for his extended and undue delay, other than ignorance of the law; such a failure has been held an insufficient basis for leave to amend. *Troxel Mfg. Co.* v. *Schwinn Bicycle Co.,* 489 F.2d 968, 971 (6th Cir. 1973), *cert. denied,* 416 U.S. 939 (1974); J. Moore, 3 Moore's Federal Practice ¶ 15.08[4] at 897-900 (1974). Thus, in *Head* v. *Timken Roller Bearing Co.,* 486 F.2d 870 (6th Cir. 1973), plaintiffs, who had brought a *timely* action under Title VII were denied leave to amend to add a cause of action under 42 U.S.C. § 1981. They sought leave on the grounds that they had become aware of the possibilities of § 1981 only after filing the complaint. The Court of Appeals upheld the denial of leave as an entirely proper exercise of discretion. *Id.* at 874-75.

We remand to the district court for a determination of appellant's motion for leave to amend and, if granted, for further proceedings in accordance with this opinion. As to appellant's other arguments, we affirm the judgment of dismissal.

---

2 Appellees' moving papers which Judge Owen endorsed asked only that Goss' complaint be dismissed. However, in their memorandum of law in support of the cross-motion, they also conclude that the motion for leave to amend should be denied.

332

480—11-1-76 . USCA—4221

MEILEN PRESS INC., 445 GREENWICH ST., NEW YORK, N. Y. 10013, (212) 966-4177

219

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of April one thousand nine hundred and seventy-seven.

Present: HON. WALTER R. MANSFIELD
Circuit Judge

HON. EDMUND L. PALMIERI

HON. RUSSELL E. SMITH
District Judges

~~Circuit Judges~~

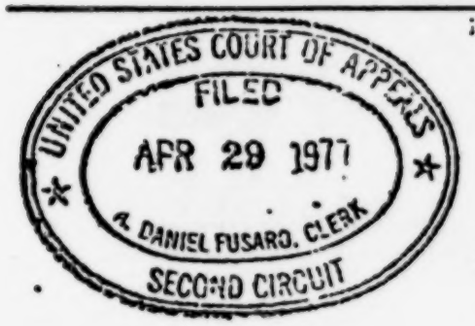
Kenil K. Goss,

Plaintiff-Appellant,

v.

Revlon, Inc. and its wholly owned subsidiary USV Pharmaceutical Corporation,

Defendant-Appellee.



76-7614

76-7614

Continued

Appeal from the United States District for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court Judge Owen, denying appellant leave to amend his complaint to add a cause of action under 42 USC §1981 is affirmed. Our prior opinion (548 F. 2d 405) (2d Cir. 1976) remanded the case to the district court to permit that court to determine in its discretion pursuant to Rule 15(a), F.R. Civ. P.; Zenith Radio Corp. v. Hazeltine Research Inc., 401 U.S. 321, rehearing denied, 401 U.S. 1015 (1971), whether to permit appellant to amend his complaint to charge discrimination in violation of 42 U.S.C. § 1981. Under the circumstances, including appellant's long delay in seeking to file his amended complaint, we find no abuse of discretion in the district court's denial of leave to amend.

Walter R. Mansfield, U.S.C.J.

Edmund L. Palmieri, U.S.D.J.

Russell E. Smith, U.S.D.J.

A-8

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of December, one thousand nine hundred and seventy-six.

Present: HON. IRVING R. KAUFMAN,
Chief Judge.

HON. WALTER R. MANSFIELD,

HON. THOMAS J. MESKILL,

Circuit Judges.

KENIL K. GOSS,

Plaintiff-Appellant,

v.

REVLON, INC. and its wholly owned subsidiary, USV PHARMACEUTICAL CORPORATION,

Defendants-Appellees.

A petition for a rehearing having been filed herein by appellant pro-se,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

76-7015
76-7065

A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seven day of June, one thousand nine hundred and seventy-seven.

Present:

HON. WALTER R. MANSFIELD,

HON. J. JOSEPH SMITH,

Circuit Judges

HON. EDMUND L. PALMIERI

District Judge

KENIL K. GOSS,

Plaintiff-Appellant

v.

REVLON, INC., and its wholly owned subsidiary, USV PHARMACEUTICAL CORP.,

Defendants-Appellees

A petition for a rehearing having been filed by counsel for the plaintiff-appellant, KENIL K GOSS

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. Daniel Fusaro

A. DANIEL FUSARO,
Clerk

UNITED STATES COURT OF APPEALS
FILED
JUN 7 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

76-7614

DOCKET NO. 76-7614

Index No. Year

73 Civ. 5286 (R.O.)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
~~NEW YORK~~

KENIL K. GOSS,

Plaintiff,

-against-

USV PHARMACEUTICAL CORPORATION and REVLON, INC.,

Defendants.

~~COPY~~

NOTICE OF CROSS-MOTION AND AFFIDAVIT

ABERMAN, GREENE & LOCKER
Attorney for Defendants
Office and Post Office Address
540 Madison Avenue
Borough of Manhattan New York, N. Y. 10022
TEMPLETON 2-7070

To , Esq.

Attorney for

MEMO ENDORSED: Defendants' motion for summary judgment is granted. The motion to dismiss is denied. So ordered. Nov 7, 1975 U.S.D.J.

G's Opposition Motion Against R's NOTICE OF CROSS-MOTION AND AFFIDAVIT (A-10)
Filed And Docketed On November 3, 1975
No. 73 CIV. 5285 (RO)

United States District Court
FOR THE
SOUTHERN DISTRICT OF NEW YORK

KENIL K. GOSS,
Plaintiff Pro Se,
et al.
v.
REVLON, INC. and its
wholly owned subsidiary,
USV PHARMACEUTICAL CORPORATION

DISCRIMINATION CIVIL ACTION

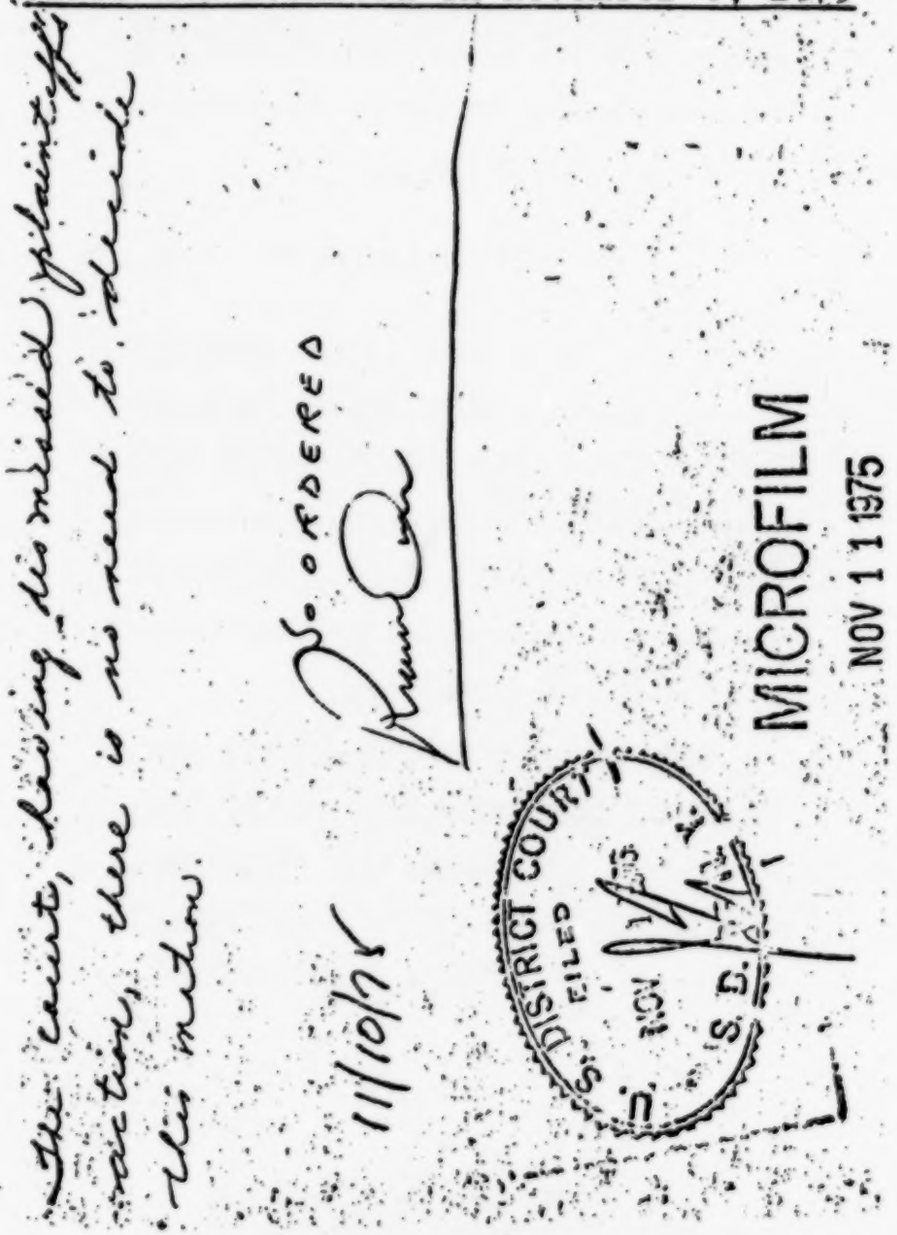
Copy Received
Attorney Green Secty
Atty for Def 11/3/75

K K Goss

Pro Se *Plaintiff*

Continued

G's Opposition Motion Against R's NOTICE OF CROSS-MOTION AND AFFIDAVIT (A-10)
Filed And Docketed On November 3, 1975



K. K. GOSS

DEC 16 1975

A-13

No. 73 Civ. 5286 (RO)

United States District Court
FOR THE
SOUTHERN DISTRICT OF NEW YORK

KENIL K. GOSS,

Plaintiff Pro Se

v.

REVLON, INC. and its
wholly owned subsidiary,
USV PHARMACEUTICAL CORPORATION
Defendants

DISCRIMINATION CIVIL ACTION

December 26, 1975

THE PLAINTIFF'S MOTION FOR A NEW TRIAL AGAINST THE SUMMARY JUDGMENT BY OWEN, J, RECEIVED BY THE PLAINTIFF ON DECEMBER 18, 1975.

Kenil K. Goss
Pro Se Plaintiff

Sent by Certified Mail on
December 26, 1975.

Continued

Treating this as a motion to reargue under Local Rule 9(m), the motion is denied.

So ordered

Dec. 31, 1975

U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KENIL K. GOSS,

Plaintiff,

-against-

REVLON, INC. and Its Wholly Owned Subsidiary, USV PHARMACEUTICAL CORPORATION,

Defendants.

OWEN, District Judge

The Court of Appeals having remanded this action for a determination as to the plaintiff, Kenil K. Goss' motion for leave to amend, I observe that the Court in its per curium opinion correctly conjectured that I denied the said motion sub silentio in granting the cross-motion to dismiss. I hereby make that ruling unequivocal.

Plaintiff's motion for leave to amend is denied nunc pro tunc.

So Ordered.

United States District Judge

November 16, 1976.

73 Civ. 5286

MEMORANDUM AND ORDER

BY CERTIFIED MAIL

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE OCT 17 1973

TO: K.K. GOSS	FROM:
Mr. Kenil K. Goss OCT 19 1973 The Gentry House 21 Fairview Avenue, Apt. 618 Tuckance, New York 10707	Equal Employment Opportunity Comm. New York District Office 90 Church Street, Room 1301 New York, New York 10007
THIS CHARGE HAS BEEN DISMISSED FOR THE FOLLOWING REASON: ☐ NO REASONABLE CAUSE ☒ UNTIMELY CHARGE ☒ NO JURISDICTION ☐ FAILURE TO PROCEED	EEOC REPRESENTATIVE Ralph Munoz, District Counsel TELEPHONE NUMBER: 264-7161 CASE/CHARGE NUMBER: TNY 3-1202

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

for Ralph Munoz
District Director

cc:

President
USV Pharmaceutical Corporation
1 Scarsdale Road
Tuckahoe, New York 10707

President
Revlon, Inc.
767 Fifth Avenue
New York, New York 10022

EEOC FORM APR 73 161 CHARGING PARTY'S COPY